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By a very recent decision, the Supreme Court of Montana has declared constitutional a statute of that State imposing a tax upon direct and collateral inheritances,—Gelsthorpe v. Furnell, 59 Pac. Rep. 267. The act was passed in 1897, and substantially provided that "all property" which should pass by will, or by the intestate laws of the State, should be subject to a tax at a fixed rate on the market value of such property; provided that an estate valued at a less sum than $7500 should not be subject to any such "tax or duty." It also provided, that the tax should be levied upon all estates which had been probated before, and should be distributed after the passage of this act; and, again, that the act should apply to all estates remaining undistributed at the time the law took effect, and that in such estates the tax should be determined and collected as in other cases. It appeared that the local authorities, in Montana, attempted to collect the inheritance tax out of an estate of a person who died a year prior to the passage of the act, but the proceeds of whose estate had not been distributed until after the law had gone into effect. The court below held that as applied to the estates of persons who might die after the law took effect, the statute was constitutional, but that where the decedent died before the passage of the act, the tax or assessment could not be collected, for as to such case the law was invalid. On appeal the lower court was reversed and the act was declared to be constitutional on all the several grounds. It was contended by those opposing the tax that the law attempts to impose a tax upon property. As to this, the court held that an inheritance or succession tax is a duty or bonus exacted in certain instances by the State upon the right and privilege of taking legacies, gifts, and successions intended to take effect at or after the death of the grantor. The burden or the tax is not imposed upon the property itself, but upon the privilege of acquiring property by inheritance. The statute provides for appraising the property to be inherited, but the object of such valuation is not to tax the property itself. It is to arrive at a measure of price by which the privilege of inheriting can be valued. The court quoted with approval the statement made by Judge Wallace, in Wallace v. Meyers, 38 Fed. Rep. 184 (U. S. C. C.), 1889, that "such a tax is no more one upon the bonds than an income tax is one upon the property out of which the income is derived, or an excise tax is one upon the articles manufactured and sold. The bonds are the subject of appraisal, but the privilege is the subject of the tax. Inasmuch as it is lawful for the State to withhold altogether the privilege of acquiring property within its dominion by will or inheritance, it is lawful for the legislature to annex any conditions to the privilege which may seem expedient and do not conflict with the organic law of the State, or the constitution or laws of the United States." In support of its contention on this point the court cited the following cases: State v. Hamlin, 86 Me. 495 (1894); Eyrie v. Jacob, 14 Grat. (Va.) 422 (1858); Strode v. Com., 52 Pa. 181 (1866); State v. Dalrymple, 70 Md. 294 (1889); Minot v. Winthrop, 162 Mass. 113 (1894); *In re* Hoffman Est., 8 Howard, 490 (1850); United States v. Perkins, 163 U. S. 625 (1896); State v. Ferris, 53 Ohio St. 314 (1895). On the question as to whether the tax violated the principle of equality and uniformity prescribed by the State constitution, it was held that there was nothing in the act violative of that provision. The legislature is not prevented by the constitution from the exercise of discretion as to what classes of rights or privileges it may enumerate as subject to taxation, provided the tax is uniform within the class and provided the classification is based upon a reasonable, and not a mere arbitrary ground. It was further decided that, though the right to a distributive share in an estate vests in those entitled, directly upon the death of the testator or intestate, such vested rights are held subject to the conditions, formalities and administrative control prescribed by the State in the interest of public order and policy.

Laws imposing taxes upon inheritances have been sustained in Pennsylvania, New York, Maryland, Virginia, North Carolina, and recently in Illinois. Kochersperger v. Executors, 167 Ill. 122, 44 Cent. L. J. 447. They have

been held invalid in New Hampshire, Ohio, and recently in Colorado,—44 Cent. L. J. 465. In the issue of the *American Law Register* for February, 1898, will be found an essay on the subject of "a very bad statute," in which the writer undertakes to show that a recent Pennsylvania statute, similar to the one upheld by the Montana court, is unconstitutional.

NOTES OF IMPORTANT DECISIONS.

EQUITABLE LIEN — ADVANCES BY BANK.—In the case of Citizens' Bank v. Adams, 84 Fed. Rep. 268, decided by the United States Circuit Court, Northern District of Illinois, it was held that a bank advancing money to stockmen for the purchase of stock, with the understanding that, according to the previous course of business, the stock would be shipped to commission merchants, sold, and the proceeds placed to the credit of the bank, for its reimbursement, is entitled to such proceeds as against the commission merchants, who are aware of the understanding and previous course of business, and they cannot appropriate such proceeds to the payment of a debt due them from the shippers. The court said: "The material facts in this case are as follows: Parsley & Markwell were buyers of cattle and shippers of the same to the stock yards at Chicago, beginning early in 1889 and running until October, 1892. They had an arrangement with the complainant whereby the complainant honored their checks for the cattle thus purchased, and thus advanced them the purchase money. During this whole period the cattle were shipped to the defendants, who were commission merchants in the Chicago Stock Yards, who, upon the receiving and selling of the same, after the deduction of their commissions, deposited the proceeds principally with the Drovers' National Bank of Chicago to the credit of the complainant. Occasionally a small amount, such as from $5 to $45, seems to have been given in currency to Markwell, and sometimes drafts and checks for considerable amounts appear to have been credited to the defendants' account as against Parsley & Markwell; but almost the entire amount of the proceeds during this period of more than three years was deposited directly to the complainant—so much, at least, undoubtedly, as kept the complainant's charges on account of advances to Parsley & Markwell fully balanced. The fact that Adams & Burke during this whole period made these deposits to the credit of the complainant was unquestionably due to the arrangement between the parties to the transaction, or, at least, to the request made by Parsley & Markwell upon Adams & Burke that the proceeds should thus be dealt with. During this period, from time to time, beginning in August, 1890, and ending in November, 1891, drafts were given by the defendants to Parsley & Markwell, for which the defendants took Parsley & Markwell's notes. These aggregated $5,000. The first note was executed by Parsley & Markwell as a firm, but upon its renewal, and at the insistence of the defendants, the note was executed, supposedly, by Parsley and Markwell each individually. This indebtedness ran along from August, 1890, until October, 1892, without any portion of it being paid, and without its existence ever having come to the knowledge of the complainant. During that whole period the defendants were receiving, each month, large amounts from the proceeds of shipments of Parsley & Markwell, and deposited the same, as usual, to the credit of the complainant. At almost any time during this period the defendants were obtaining from the shipments enough money to discharge this note. I am convinced that the defendants knew that the complainant was advancing money upon the faith of the arrangement that the proceeds should be deposited to their credit, and know, also, that any interruption of this arrangement by the withholding of proceeds to pay off these notes would lead to a rupture, and probably to a demand by the bank for a return of the fund. The last shipment made was in October, 1892, when the cashier of the complainant, in the presence and hearing of a soliciting agent of the defendants, advanced something like $8,000 upon the assurance that as soon as the stock was received in Chicago the money would be deposited to the credit of the bank to meet certain obligations that the bank was obliged to keep with another bank. The defendants, however, upon the receipt and sale of this stock, withheld sufficient to pay off their note, and deposited the balance. This bill is to compel them to account to the complainant for the sums thus withheld.

I hold, upon the ruling in Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct. Rep. 118, that as between the defendants, the commission merchants, and the complainant advancing the money, and by virtue of the understanding between them, both as evidenced by a long course of dealing and direct communication, the complainant bank was the beneficial owner and shipper of these cattle, and was, therefore, entitled to the proceeds up to the amount of its advancements."

SALE—PASSING TITLE—DELIVERY OF BILL OF LADING.—It is decided by the Supreme Court of Oregon, in Wadhams & Co. v. Balfour, 51 Pac. Rep. 642, that the presumption of law that the title to property does not pass if something remains to be done for the purpose of testing the property transferred, or fixing the amount, or putting it in condition for final delivery, until the act is done, may be overcome by the intention of the parties to the transaction. It appeared that wheat was offered by sample to a prospective buyer, who accepted it at an agreed price, and received the samples and the bill of lading therefor. The wheat was destroyed before it was in-

spected. In an action to recover the agreed price from the buyer, it was shown that in all previous similar transactions the buyer inspected the grain at its destination, and claims for the variations in quantity or quality were adjusted at the buyer's dictation. It was held that there was an implied warranty that the wheat was equal in kind and quality to the sample, but that the title of the wheat passed by delivery of the bill of lading, and the right to inspection was a condition subsequent to the passing of the title, which did not relieve the buyer of liability for the price agreed on, although inspection had been made impossible. It was also held that the delivery of the bill of lading of a car of wheat, by indorsement in blank to the purchaser of the wheat, is a sufficient delivery of the said wheat to take the transaction out of the statute of frauds.

NOTE—EXECUTION UNDER DURESS — FRAUD ON SURETY.—It is held by the Supreme Court of Michigan, in Beath v. Chapoton, 73 N. W. Rep. 806, that one who embezzled money, and gave a note in acknowledgment of the debt, cannot defend in an action on the note on the ground that he executed it to escape a threatened criminal prosecution. The court says: "Complaint is made that the court erred in instructing the jury: 'If you find that the note was obtained from Chapoton upon threats of criminal prosecution, plaintiff cannot recover.' Counsel for defendants cite only one authority to support this instruction, viz: Hackley v. Headley, 45 Mich. 574, 8 N. W. Rep. 511. The action in that case was upon a promissory note. The defense was duress, in that the plaintiffs took an unconscionable advantage of defendant's financial straits, thereby compelling him to accept $2,000 less than was his due. The defense was held bad. This case was approved and followed in Goebel v. Linn, 47 Mich. 489, 11 N. W. Rep. 284. Chapoton had been for a long time in the employ of plaintiff, who claimed that he had embezzled large sums of money. Plaintiff testified that Chapoton admitted the embezzlement; that it was agreed to amount to $2,700; that Chapoton agreed to give four notes of $675 each, and to be secured by indorsements, in settlement of the claim. He denied any threats to prosecute, and any knowledge of representations made by Chapoton to Watson. The record states that 'defendant Chapoton gave evidence tending to show that a short time before these notes were given Beath claimed that he (Chapoton) had embezzled money from the said Beath, and that he threatened to prosecute him, and put him in jail, and disgrace him; and that he would not have executed such note except for the fear of criminal prosecution, and on account of the threats so made by said Beath.' This statement is the sole foundation for claiming duress. If Chapoton had embezzled money, and notes or other evidences of debt, with security, were given by Chapoton, in settlement and acknowledgment of the debt, he could not defend upon the ground that plaintiff threatened criminal prosecution, if his honest debt was not acknowledged and secured. Wolf v. Troxell's Estate, 94 Mich. 573, 54 N. W. Rep. 383. The law does not permit a criminal, who has stolen property, to defend against the debt, or its written acknowledgment, on the ground of threatened prosecution or imprisonment. Such a rule would often be attended with disastrous results. A party might settle his peculation by giving his notes, payable after the statute of limitations could be pleaded in bar of the original debt. If, instead of an indorsed note, Chapoton had given a note and mortgage for $2,700 (and he admits that he agreed to this amount, and to give four promissory notes therefor), would he be permitted to avoid his just liability by saying, 'True, I owed it, but plaintiff threatened to prosecute me if I didn't pay it, and therefore I secured my honest debt?' The consideration for the note in such cases is not the avoidance of a criminal prosecution, but the just debt. A was convicted of larceny, and sentenced to pay a fine of $1,000, and was confined in prison. He executed a mortgage to the county for $1,000, in condition of which he was pardoned. He filed a bill in equity to set aside the foreclosure sale on the ground of duress. Decree was entered for the amount actually due. Rood v. Winslow, Walk. Ch. 340, 2 Doug. 67. Where W gave a mortgage for $5,000 to settle a charge of adultery, the same defense was interposed. The securities were held valid to the amount actually due, viz: $2,000. Briggs v. Withey, 24 Mich. 136. B paid license taxes under threats of prosecution from the village attorney. The taxes were void. Held, that they were not paid under duress. Betts v. Village of Reading, 93 Mich. 79, 52 N. W. Rep. 940. See, also, Cribbs v. Sowle, 87 Mich. 347, 49 N. W. Rep. 587, and authorities there cited. 'Duress by threats exists, not wherever a party has entered into a contract under the influence of the threat, but only when such threat excites fear of some grievous wrong, as of death, or great irremediable injury, or unlawful imprisonment.' 6 Am. & Eng. Enc. Law, 64. Threats of criminal prosecution, unaccompanied by threats of immediate imprisonment, do not constitute duress. Harmon v. Harmon, 61 Me. 227; Buchanan v. Sahlein, 9 Mo. App. 552; Bodine v. Morgan, 37 N. J. Eq. 426; Dunham v. Griswold, 100 N. Y. 224, 3 N. E. Rep. 76. 'Threat of legal process is not duress, for the party may plead, make proof, and show that he is not liable.' Preston v. Boston, 12 Pick. 14. In Bodine v. Morgan the defendants, father and son, were charged with fraudulently taking and appropriating business orders. The father settled, and gave a mortgage of $5,000. His defense was substantially the same as that here set up. The court used the following language: "But, further, the threat to arrest him for his unlawful appropriation of their goods and orders to his own use unless he should indemnify them, constituted, if it was made, no duress; and, if the mortgage had been given under the pressure of

such a threat, it would not have affected its validity.' It was incumbent upon defendant Chapoton to establish two facts,—the illegality of the demand and the duress. Buchanan v. Sahlein, *supra*. Defendant Chapoton was under no physical restraint. According to his own statement, plaintiff had previously made the claim of embezzlement, and threatened prosecution if it was not settled. Chapoton telephoned to his friend Watson, requesting him to call at plaintiff's store. Watson complied, and while the three were there together the notes were executed. There is no evidence of any threats or restraint at that time, no prosecution had been commenced, nor was there any statement that any had been commenced, and he was free to go and come as he chose. It therefore appears that Chapoton, after the alleged charge and threats were made, took ample time to consider it, and then voluntarily settled by giving these notes. This is not the course pursued by a man conscious of his innocence, and in the possession of his faculties. There is nothing to show that he was young or old, inexperienced, feeble in body or mind, or unable to indignantly deny and resist a false charge of embezzlement and felony. Under this record the only question to be submitted to the jury with regard to him was whether there was a failure of consideration, in whole or in part, for the notes. Under the above decisions, he was liable upon them to the extent of moneys appropriated by him, if any were so appropriated; and it was the province of the jury to determine the amount. If he had appropriated none of the plaintiff's money of course the note was without consideration, and void."

GAMING—LOTTERY—APPORTIONMENT BY LOT.—In Chaney Park Land Co. v. Hart, 73 N. W. Rep. 1058, decided by the Supreme Court of Iowa, it appeared that certain lots, contracted for by the promoters of a packing house plant, were subscribed for under an agreement to take the number set opposite the name of each subscriber, if the packing house was secured. The lots were to be apportioned "in such manner as (subscribers) may decide." At a meeting called by the promoters to divide the lots by a "method * * * to be decided upon by vote of subscribers," the plan of one of the promoters was adopted; the other promoters taking no active part, and all having announced that they left the method of apportionment to the subscribers. The subscribers' names were drawn out of one box, and the numbers of the lots to correspond were drawn out of the other, by two of the subscribers agreed upon. None of the lots were worth more than the price paid. It was held that the apportionment of the lots was by the subscribers alone, and the method was not a lottery, within the meaning of Code 1873, § 4043, or Const. art. 3, § 28, prohibiting lotteries. The court said: "It is conceded that the defendant's contract for the purchase of the lot, if in pursuance of, or in promotion of, a lottery scheme, is against public policy, and cannot be enforced. Guenther v. Dewien, 11 Iowa, 133; Seidenbender v. Charles, 8 Am. Dec. 682, and notes; 13 Am. & Eng. Enc. Law, 1187. For, if a transaction is prohibited by the statute, a contract based thereon is void. It is important, then, to determine what is a lottery, such as prohibited by the statute and constitution. Sec. 28, art. 3, Const. Iowa; Code 1873, sec. 4043. The word has not acquired a technical or legal significance differing from that of approved usage in the language. The lexicographers are agreed that a distribution of prizes by lot or chance may constitute a lottery. Worcester and the American Cyclopædia include payment of a consideration for the chance, while nearly all refer to it as a scheme. See U. S. v. Olney, 1 Deady, 461, Fed. Cas. No. 15,918. To bring the transaction within the meaning of the statute prohibiting lotteries, something of value must be parted with, directly or indirectly, by him who has the chance. Yellowstone Kit v. State, 88 Ala. 196, 7 South. Rep. 338; *Id.*, 16 Ann. St. Rep. 38, and extended note; Cross v. People, 18 Colo. 321, 32 Pac. Rep. 821. The authorities uniformly refer to a lottery as a scheme. Bishop defines it as 'a scheme by which, on one's paying money, or some other thing of value, he obtains the contingent right to have something of greater value, if an appeal to chance, by lot or otherwise, under the direction of the manager of the scheme, should decide in his favor.' Bish. St. Crimes, sec. 952. The accepted definition of the Court of Appeals of New York is found in Hull v. Ruggles, 56 N. Y. 424, approved in Wilkinson v. Gill, 74 N. Y. 63: 'Where a pecuniary consideration is paid, and it is to be determined by lot or chance, according to some scheme held out to the public, what and how much he who pays the money is to receive for it, that is a lottery.' In Rothrock v. Perkinson, 61 Ind. 39, the court says: 'It is well settled in this State that every scheme for the division or disposition of property or money by chance, or any game of hazard, is prohibited by law, and that every contract or agreement in aid of such a scheme is void.' The Supreme Court of Michigan defines a lottery as a 'scheme by which a result is reached by some action or means taken, and in which the result of man's choice or will has no part, nor can human reason, foresight, sagacity or design enable him to know or determine such results until the same has been accomplished.' People v. Elliott, 74 Mich. 264, 41 N. W. Rep. 916. So, in State v. Clarke, 33 N. H. 329: 'Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public, what the party who pays the money is to have for it, or whether he is to have anything, it is a lottery, within the meaning of the statute.' See also Lynch v. Rosenthal (Ind. Sup.), 42 N. E. Rep. 1103, 13 Am. & Eng. Enc. Law, 1164. It thus appears that there must be some plan or scheme, on the part of the promoters of the enterprise

alleged to be unlawful, for the sale or disposition of property by lot or chance, before it can be said to have the character of a lottery. If the sale is without the purpose that the property, or any part of it, shall be obtained by the purchaser through chance, and this does not result from the nature of the transaction, then it is not so tainted. The sale of the lots to the subscribers in this case was not in pursuance of any design to promote a lottery, or in evasion of the law. Each subscriber contracted—as he had the right to do—for the purchase of one or more of the lots, with the understanding that they should be apportioned as the subscribers themselves might determine. Having agreed to buy before the land was platted—induced by a desire to aid an enterprise of anticipated advantage to the city—they concluded, after much discussion, and the proposal of other plans, to make the selection by drawing the number of a lot and a name from different boxes at the same time. We know of no good reason why these purchasers did not have the right to divide their property, or that contracted for, according to their own notions and agreement. We have discovered no authority denying them that right, but, on the contrary, it is recognized in Com. v. Manderfield, 8 Phila. 457; 2 Whart. Cr. Law, sec. 1891; Yellowstone Kit v. State, *supra*. Joshua so apportioned the promised land among seven tribes of the children of Israel. The disciples of Christ chose Matthias to succeed Judas by casting lots. Under the laws of this State, the right to an office is determined, when there is a tie vote, by the same method. Code, sec. 1169. There was nothing in the transaction opposed to good morals, and it was not a lottery, within the meaning of the law. Without a scheme or plan to distribute by chance, on the part of the promoters, the vital part of a lottery was lacking. The evidence fails to show that any fraud was practiced as to this defendant."

MASTER AND SERVANT—FELLOW-SERVANTS—WHO ARE.—The Supreme Court of Appeals of Virginia hold, in Norfolk & W. R. Co. v. Houchin's Admr., 28 S. E. Rep. 578, that in the absence of a statutory enactment, the master's liability for the negligent act of one servant against another is determined solely by the question whether the act of the negligent servant was in the performance of a duty imposed by the common law upon the master toward the injured servant, and not whether the negligent servant had been placed by the master in a position of superior grade, or in authority and control over the injured servant. Hence a conductor and a brakeman are fellow-servants, so as to preclude a recovery from the railroad company for a brakeman's death, where it was caused by the negligence of the conductor in running the train in violation of rule. The court says *inter alia*: "The rule known as the rule of 'superior servant'—that is, where the negligent servant is in grade of employment superior to the injured one, or where one servant is placed by the master in a position of subordination, and subject to the orders and control of another, in such a way and to such an extent that the servant so placed in control may reasonably be regarded as representing the master as his *alter ego* or vice-principal, and the inferior servant is injured by the negligence of the superior servant, the master is liable—originated, it may be said, in the case of Railway Co. v. Ross, *supra*, and nearly all the decisions of the other courts holding to the doctrine that a conductor of a train was a vice-principal standing in the shoes of his master, because given authority and control over his train, and of the other employees on it, etc., are traceable to the Ross Case as the authority upon which the decision mainly rested. But the doctrine enunciated in the Ross Case has, as we have before said, been overthrown by the more recent decisions of the United States Supreme Court, among which are: Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. Rep. 914; Railroad Co. v. Hambly, 154 U. S. 349, 14 Sup. Ct. Rep. 983; Railroad Co. v. Keegan, 160 U. S. 259, 16 Sup. Ct. Rep. 269; Railroad Co. v. Peterson, 162 U. S. 346, 16 Sup. Ct. Rep. 843; Railroad Co. v. Charless, 162 U. S. 359, 16 Sup. Ct. Rep. 848; Oakes v. Mase, 165 U. S. 363, 17 Sup. Ct. Rep. 345; Martin v. Railroad Co., 166 U. S. 399, 17 Sup. Ct. Rep. 603. In the last case only Justice Harlan dissented. See also Mining Co. v. Whelan (recently decided by the United States Supreme Court, not yet officially reported), 18 Sup. Ct. Rep. 40.

In the case of Railroad Co. v. Peterson, *supra*, the court carefully reviews the subject, and holds that a foreman of a gang of laborers, having in charge the superintendence of the gang in working, with power to hire and discharge hands, and exclusive charge of their direction and management in their employ, is a fellow-servant, in fact and in law, with others of the gang, and that the company is not liable for an injury received by one of them from the negligence of the foreman because of their fellow-servantcy. The syllabus in that case is: (1) That the mere superiority of the negligent employee in position and in power to give orders to subordinates is not a ground for such liability. (2) That, in order to form an exception to the general law of non-liability, the person whose neglect caused the injury must be one who was clothed with the control and management of a distinct department, and not of a mere separate piece of work in one of the branches of service in a department. (3) That, when the business of the master is of such great and diversified extent that it naturally and necessarily separates itself into departments of service, the persons placed by the master in charge of these separate branches and departments, and given control therein, may be considered, with reference to employees under them, vice-principals and representatives of the master, as fully as if the entire business of the master were placed by him under one superintendent.

Elliott, in his recent work on Railroads (volume

3, § 1330), says: 'There is comparatively very little conflict upon the question as to whether trainmen engaged in operating the same train are fellow-servants, the very decided weight of authority holding them to be fellow-servants. This seems to us the only rule that can be defended on principle; for such employees are, in the strictest sense, engaged in the service of a common master, their service is of the same general character, and the object of the service is a common one. * * * We cannot perceive how the doctrine which declares that employees of the same train are not fellow-servants can be upheld without violating the principle that the details of operating a railroad do not pertain to, or form a part of, the master's duty.'

And in section 1331 the same author says: 'It seems to us that the rule must be the same whether the trainmen are engaged on the same train or on different trains. There is, as we think, no valid reason for discriminating between cases where the employees are engaged in operating the same train and cases where they are engaged in operating different trains. In both cases they are employed in the same line of service, and by a common master.'

In the view taken by this learned author we fully concur, and in addition to the numerous authorities cited by him in favor of the doctrine that trainmen, although engaged on different trains, are fellow-servants, many others may be cited, among which are: 3 Wood, Ry. Law, 1788; Wood, Mast. & S. § 448; Story, Ag. § 453; Webb, Pol. Torts, 121; 7 Am. & Eng. Enc. Law, 834, and notes; Hankins v. Railroad Co., 142 N. Y. 416, 37 N. E. Rep. 466; McElligott v. Randolph (Conn.), 22 Atl. Rep. 1094; Railway Co. v. Smith (Tex. Sup.), 13 S. W. Rep. 562; Harrison v. Railroad Co. (Mich.), 44 N. W. Rep. 1034; Coke Co. v. Peterson (Ind. Sup.), 35 N. E. Rep. 7; Railway Co. v. Smith, 59 Ala. 245; Jenkins v. Railroad Co. (S. Car.), 18 S. E. Rep. 182; Mechem, Ag. § 668; Avery & Sons v. Meek, 96 Ky. 192, 28 S. E. Rep. 337; Railroad Co. v. Donnelley's Admr., 88 Va. 853, 14 S. E. Rep. 692; Railroad Co. v. Nuckol's Admr., *supra*.

Judge Cooley, in his work on Torts (2d Ed.), pp. 639, 640, says: 'In some quarters a strong disposition has been manifested to hold the rule (of fellow-service) not applicable to the case of a servant who at the time of the injury was under the general direction and control of another, who was intrusted with duties of a higher grade, and from whose negligence the injury resulted. But it cannot be disputed that the negligence of a servant of one grade is as much one of the risks of the business as the negligence of a servant of any other; and it seems impossible, therefore, to hold that the servant contracts to run the risk of negligent acts or omissions on the part of one class of servants, and not those of another class. Nor, on grounds of public policy, could the distinction be admitted, whether we consider the consequences to the parties to the relation exclusively, or those which affect the public, who, in their dealings with the employer, may be submitted to risks. Sound policy seems to require that the law should make it for the interest of the servant that he be not himself negligent, but also that any negligence of others in the same employment be properly guarded against by him, so far as he may find it reasonably practicable, and be reported to his employer, if needful; and, in this regard, it can make little difference what is the grade of the negligent servant, except as the superior authority may render the negligence more dangerous, etc. See also authorities cited in note 1, p. 640, Cooley, Torts.

In England and in some of the States of the Union this question of fellow-service is controlled by statute, but we have no such statute in our State, and the doctrine enunciated in Railroad Co. v. Donnelley's Admr., *supra*, and Railroad Co. v. Nuckol's Admr., *supra*, sustained by the most eminent commentators, and a great majority of the adjudicated cases, whose reasoning is followed in the decision of this case, must be regarded as the settled law with us until the law making power of the State may deem it proper to change it."

THE ACTION OF MALICIOUS PROSECUTION.

When one person having no reasonable or probable cause so to do, sets in motion the law's processes against another person maliciously, and thereby inflicts a legal injury on the other by arresting his person, or seizing his goods, or doing any other disturbance to his person or property, or subjecting him to labor and expense of a defense beyond what he may recover in taxable costs, such person commits a civil wrong, for the redress of which the injured party is entitled to an action for malicious prosecution. But, if the proceeding against the injured party is successful, he is estopped to assert that it was without probable cause, and that it was malicious, therefore he cannot bring his action for redress until that proceeding is terminated.[1] There are other torts for which actions will lie,[2] but they only resemble the ac-

[1] Bishop on Non-contract Law, sec. 250; Cooley on Torts (ed. 1888), p. 208; Addison on Torts (Wood's ed. 1876), sec. 852; Pollock, Law of Torts (Text Book Series), p. 148, 191; Von Koehring v. Witte (Tex.), 40 S. W. Rep. 63; Douglss v. Allen, 46 N. E. Rep. 707.

[2] "Malicious arrest; bringing or conspiring to bring a civil action vexatiously; maliciously taking proceedings in bankruptcy; maliciously presenting a petition for the winding up of a company; maliciously obtaining a search warrant; maliciously exhibiting articles of the peace." Stephen on Malicious Prosecution, p. 20. See also Everett v. Henderson, 24 How.

tion for malicious prosecution, and it is not the purpose to discuss any of them at this time; it being the object of this article to set forth the essential elements of an action for malicious prosecution. In order to make a person liable in an action for malicious prosecution, he must have prosecuted another person. And, therefore, the first question is, What is a prosecution? The answer to this question seems not to have been given very often by the judiciary in the form of a definition, but certain acts have been held to be, or not to be, a prosecution. Mr. Justice Lopes, in Dauby v. Beardsley, 43 L. T. 603, says, "this might be a definition of a prosecutor—a man actively instrumental in putting the criminal law in force." But this, it is remarked, "requires to be qualified by the observation, that not merely the ministerial, but the judicial functions of the criminal law must be put in motion, that is, some judicial officer must be made to act in his judicial capacity. It is not enough to say something which puts it into the head of somebody else to become instrumental."[3] Yet that observation must be coupled with the statement that it must be kept in mind that there is a distinction between malicious prosecution and false imprisonment, and that in the United States it is actionable to put in force the civil law from malicious motive and without probable cause,[4] and that prosecution must be ended in favor of the party who brings the action subsequently for the malicious prosecution of the former suit.[5] After it has been determined that the processes of the law have been put in motion without reasonable or probable cause and from malicious motives, and that the proceeding has ended in favor of the defendant, and it has been decided to bring an action for malicious prosecution for redress, the first question is, What are the necessary allegations required in the petition therefor? No action lies merely for bringing a suit against a person without sufficient cause. To sustain an action for malicious prosecution the former suit must have been without probable cause and malicious.[6] In the absence of a statute conferring the right, no action can be maintained for a mere wrongful attachment, except on the attachment bond.[7] The material facts to sustain an action for malicious prosecution are: 1st. That "a suit or proceeding has been instituted without any probable cause therefor. 2d. The motive in instituting it was malicious. 3d. The prosecution was terminated in the acquittal or discharge of the accused,"[8] or

(U. S.) 545; Herron v. Hughes, 25 Cal. 555; Hutchins v. Hutchins, 7 Hill (N. Y.), 104; Swan v. Saddlemire, 8 Wend. (N. Y.) 676; Phelps v. Goddard, 1 Tyler (Vt.), 60; Parker v. Huntington, 2 Gray (Mass.), 124; Bauer v. Clay, 8 Kan. 580; Stone v. Stevens, 12 Conn. 219; Streight v. Bell, 37 Ind. 550; Frierson v. Hewitt, 2 Hill (S. Car.), 499; Harlan v. Jones, 45 N. E. Rep. 481.

[3] Stephen on Malicious Prosecution, pp. 5 to 18, giving many illustrations of what is, and what is not, a prosecution. See also Cooley on Torts (ed. 1888), p. 208, 181. To same effect in note, compare Holden v. Merritt, 61 N. W. Rep. 390; Wait's Action and Defenses, vol. 4, pp. 337 to 342; Bishop on Non contract Law, sec. 221, note; Harlan v. Jones, 45 N. E. Rep. 481; Strethlow v. Pettit (Wis.), 71 N. W. Rep. 102.

[4] For distinction between malicious prosecution and false imprisonment, see Bishop on Non-contract Law, sec. 228, and cases cited. And see, generally, Stephen on Malicious Prosecution, *120; Wait's Actions and Defenses, vol. 4, pp. 341 and 342; Cooley on Torts (ed. 1888), pp. 217 to 220, *187, 21 Am. Law. Reg. 370, and 30 Am. Law Reg. 281, 353, and cases cited. For malicious attachment, Tallant v. Burlington Gaslight Co., 37 Iowa, 261; Ivy v. Barnhartt, 10 Mo. 151; Wiley v. Trailwick, 14 Tex. 662. But see Kirksey v. Jones, 7 Ala. 622; Lee, Breathwit v. Rogers, 39 S. W. Rep. 553. For suing out an injunction, Butchers' Co. v. Crescent City, etc. Co., 37 La. Ann. 874; Newark Coal Co. v. Upson, 40 Ohio St. 17; Kolka v. Jones (N. D.), 71 N. W. Rep. 558.

[5] Gillespie v. Hudson, 11 Kan. 163; Wheeler v. Nesbitt, 24 How. (U. S.) 544; O'Brien v. Barry, 106 Mass. 300; Feitt v. Davis, 49 Vt. 151; Brown v. Randall, 36 Conn. 56; Hibbing v. Hyde, 50 Cal. 206; Gorrell v. Snow, 31 Ind. 215. As to what is a termination of the prosecution, see Wait's Action and Defenses, vol. 4, pp. 347 to 349. It may be a *nolle prosequi*, an acquittal, or its equivalent; a discharge, a failure to indict, a dismissal or an abandonment of the prosecution, or an ending of the civil action, "What is an end of the proceeding?" Cooley on Torts (2d ed.), p. 215; Lowe v. Wartman, 47 N. J. L. 413; Marks v. Townsend, 97 N. Y. 500; Morton v. Young, 55 Me. 24; Casebeer v. Rice, 18 Neb. 203; Cardival v. Smith, 109 Mass. 159; Leever v. Hamill, 57 Ind. 423. A dismissal in one court to begin again in another, and if begun in the other court at once, it is not a termination. Schippell v. Norton, 38 Kan. 567. Final judgment is the end, though petition for new trial may be afterwards filed. Foster v. Denison, 36 Atl. Rep. 93. See also Lawrence v. Cleary (Wis.), 60 N. W. Rep. 793, 88 Wis. 473. See generally Foster v. Denison (R. I.), 36 Atl. Rep. 93; Hinds v. Parker, 42 N. Y. Sup. 955; Von Koehring v. Witte (Tex. App.), 40 S. W. Rep. 63.

[6] Van Duzor v. Linderman, 10 Johns. (N. Y.) 106; Cooley on Torts (2d ed.), p. 207, *180; Wasserman v. Louisville Ry., 28 Fed. Rep. 802; Cooley on Torts (2d ed.), 207.

[7] Drake on Attachments, p. 729, top. See Foster v. Pitts (Ark.), 38 S. W. Rep. 1114; Schaper v. Sutter, 63 Ill. App. 257.

[8] Cooley on Torts (2d ed.), p. 208; Marbourg v. Smith, 11 Kan. 554, 562; Bishop on Non-contract Law, secs. 220 to 250, and cases cited; Dreyfus v. Aue (Neb.), 45 N. W. Rep. 282; Low v. Greenwood, 30 Ill. App.

that the civil suit is ended. The petition for an action for malicious prosecution must allege that the plaintiff has been prosecuted by the defendant; that the prosecution was malicious; that it was instituted without probable cause; that the prosecution has terminated in his favor; and that he has sustained damage.[9] It must be alleged that the prosecution was malicious and without probable cause.[10] An averment that there was no probable cause is indispensable. The words falsely and maliciously are not sufficient.[11] Malice and want of probable cause must both concur to maintain the action;[12] the defendant must be connected by averment with execution of the process.[13] The principle of awarding damages is the same whether the prosecution was under the criminal law or in a civil proceeding, and the plaintiff in the action for malicious prosecution is not limited to the actual damages proved,[14] but may be awarded exemplary damages and compensation for injuries to "reputation, feelings, health, mind and person."[15] But to recover special damages the plaintiff must specially allege them, and set forth particularly the causes that produced them. Costs and attorney fees should be specially alleged,[16] and, probably, exemplary damages.[17] The defenses to an action for malicious prosecution may be: 1st, a denial of arrest; 2d, probable cause; 3d, want of malice; 4th, former suit not terminated; 5th, advice of counsel; 6th, justification of prosecution, and, perhaps, some others. Knowing the proper defense, how shall it be pleaded?[18]

The pleading most generally relied upon by the defendant, if the petition is in proper form, is a general denial. Under this, according to many authorities, the defendant may show probable cause;[19] guilt of the plaintiff;[20] that he acted in good faith upon

184; McGarry v. Mo. P. Ry. Co., 36 Mo. App. 340; Fenstermaker v. Page (Nev.), 21 Pac. Rep. 322; Glasgow v. Owen, 69 Tex. 167, 6 S. W. Rep. 527; Coleman v. Allen, 79 Ga. 637, 5 S. E. Rep. 204; McFadden v. Whitney (N. J.), 18 Atl. Rep. 62; Jones v. Jones, 71 Cal. 89, 11 Pac. Rep. 817; McNulty v. Walker, 64 Miss. 198, 1 South. Rep. 55.

[9] Schippel v. Norton, 38 Kan. 567, 571. For forms of petition see Nash, Pleading and Practice (4th ed.), vol. 1, pp. 486, 487, 489, 603, 608, 610; Boone, Code Pleading (pony series), vol. 2, pp. 272 to 278; 2 Chitty's Pleading, 610, *et seq.*; See, generally, Am. & Eng. Ency. of Law, vol. 14, p. 42. As to allegation of termination of suit, see Am. St. Rep. (Souvenir ed.) 152; O'Brien v. Barry, 106 Mass. 300, 8 Am. Rep. 329; Brown v. Randall, 36 Conn. 56, 4 Am. Rep. 35; Wood v. Laycock, 3 Metc. (Ky.) 192; Grant A. Moore, 29 Cal. 644; Cardival v. Smith, 109 Mass. 158, 12 Am. Rep. 682; Driggs v. Burton, 44 Vt. 124; Schoonover v. Myers, 28 Ill. 308; Kelley v. Sage, 12 Kan. 109; Fay v. O'Neill, 36 N. Y. 11; Gilbert v. Emmons, 42 Ill. 143; Wait's Actions and Defenses, vol. 4, pp. 347 to 349. See generally Eagleton v. Kabrich, 66 Mo. App. 231; Struby, etc. v. Keyes (Colo. App.), 48 Pac. Rep. 663.

[10] Moody v. Deutsch, 85 Mo. 237-242; Besson v. Southard, 10 N. Y. 236; Marbourg v. Smith, 11 Kan. 554-562; Israel v. Brooks, 23 Ill. 526; Van Duzor v. Linderman, 10 Johns. (N. Y.) 106; Foshay v. Ferguson, 2 Denio (N. Y.), 617, note; Am. & Eng. Ency. of Law, vol. p. 42; Hall v. Suydam, 6 Barb. (N. Y.) 83; Griffin v. Chubb, 58 Am. Dec. 85; Jocum v. Polly, 38 Am. Dec. 583; Williams v. Hunter, 14 Am. Dec. 597, note; Spengler v. Davy, 15 Gratt. (W. Va.) 381; Burkhast v. Jennings, 2 W. Va. 242; Wait's Action and Defenses, vol. 4, pp. 342 to 347; Addison on Torts, secs. 852 to 855 (Wood's ed.); 2 Boone's Code Pleading, p. 273, form No. 351; Johnston v. Meaghr (Utah), 47 Pac. Rep. 861.

[11] 1 Hilliard on Torts, pp. 480 and 481, note; 2 Greenleaf's Ev., sec. 454; Burton v. Knapp, 81 Am. Dec. 479, note; Cousins v. Swords, 43 N. Y. Sup. 907.

[12] Frowman v. Smith, 12 Am. Dec. 265, note; 2 Greenleaf's Ev., sec. 453; Am. St. Rep. (Souvenir ed.), 153; McNulty v. Walker, 64 Miss. 198, 1 South. Rep. 55; Jones v. Jones, 71 Cal. 89, 11 Pac. Rep. 817. Epstein v. Berkowsky, 64 Ill. App. 498; Wright v. Hayter (Kan.), 47 Pac. Rep. 546; Foster v. Pitts (Ark.), 38 S. W. Rep. 1114.

[13] Drake on Attachment, sec. 730.

[14] Wait's Actions and Defenses, vol. 4, pp. 351 and 352. See also Lawrence v. Hagerman, 56 Ill. 68; Closson v. Staples, 42 Vt. 209, 1 Am. Rep. 316; Fagnan v. Knox, 8 Jones & S. (N. Y.) 41, 66 N. Y. 525; McWilliams v. Hoban, 42 Md. 56; Chapman v. Dodd, 10 Minn. 350; Ziegler v. Powell, 54 Ind. 173.

[15] Sheldon v. Carpenter, 4 N. Y. 579.

[16] Stanfield v. Phillips, 78 Pa. St. 73; Miles v. Weston, 60 Ill. 361; Strange v. Whitehead, 12 Wend. (N. Y.) 64; Donnell v. Jones, 13 Ala. 490.

[17] Moehring v. Hall, 66 Tex. 240.

[18] For forms of answers, see 2 Boone on Code Pleading, pp. 276 to 278. It is said that a denial of arrest must be direct and positively alleged. Lawrence v. Derby, 15 Abb. Pr. 346, note. For defenses to the action, see Wait's Actions and Defenses, vol. 4, pp. 353 to 356. See also Ewing v. Sanford, 21 Ala. 157; Calef v. Thomas, 81 Ill. 478; Graeter v. Williams, 55 Ind. 461; Turner v. O'Brien, 5 Neb. 542; Farnan v. Feeley, 56 N. Y. 451; Harpham v. Whitney, 77 Ill. 32; Burris v. North, 64 Mo. 426; Fisher v. Forrester, 33 Pa. St. 501; Skidmore v. Bricker, 77 Ill. 164; Stanton v. Hart, 27 Mich. 539; Olmstead v. Partridge, 82 Mass. 381; Sharpe v. Johnston, 59 Mo. 557; Cooper v. Utterback, 37 Md. 282; Cole v. Curtiss, 16 Minn. 182; Plath v. Braunsdorff, 40 Wis. 107.

[19] Trogden v. Deckard, 45 Ind. 572; Raddle v. Ruckgaber, 3 Duer (N. Y.), 684; Benedict v. Seymour, 6 How. Pr. (N. Y.) 298; Rost v. Harris, 12 Abb. Pr. (N. Y.) 446; Harlan v. Jones (Ind.), 45 N. E. Rep. 481. Compare John v. Bridgman, 27 Ohio St. 22. But defendant will not be permitted to urge insufficiency of the complaint on which he arrested the plaintiff (Minneapolis T. Mch. Co. v. Regier [Neb.], 70 N. W. Rep. 934), or that the complaint was informal. Hess v. Webb, 53 Ill. App. 53.

[20] Bruley v. Rose, 57 Iowa, 651.

the advice of competent counsel;[21] but the authorities are not harmonious on this statement.[22] The evidence in the action is very important, and there are some presumptions that should not be overlooked. The burden of proof is upon the plaintiff.[23] The discharge of prosecution is not *prima facie* evidence of malice, or want of probable cause.[24] Termination of prosecution is not *prima facie* evidence of want of probable cause.[25] The acquittal of the defendant is not of itself evidence of the malice of the prosecutor.[26] Malice in fact as distinguished from malice in law must be proved.[27] Malice alone is not sufficient, there must be a want of probable cause; and a want of probable cause cannot be inferred from malice,[28] and want of probable cause cannot be implied from the most express malice.[29] "If the defendant had, in the opinion of the jury, a probable ground for suspicion, this amounts to probable cause."[30] An action for unlawfully suing out an attachment, unless brought under a statute, cannot be sustained unless malice and want of probable cause are shown.[31] The prosecutor is not liable if he prosecuted from apparent guilt arising from circumstances which he honestly believed;[32] guilt or innocence is not the gist of the action.[33] Plaintiff's bad character may be shown as tending to show probable cause.[34] Acting under advice of counsel by defendant properly obtained is competent evidence to rebut malice.[35] "If a party lays all the facts of his case fully and fairly before counsel, and acts in good faith upon the opinion given by such counsel (however erroneous that opinion may be), it is sufficient evidence of a probable cause, and is a good defense to an action for a malicious prosecution."[36] Want of probable cause is evidence of malice for the consideration of the jury,[37] and malice

[21] Sparling v. Conway, 6 Mo. App. 283; Wright v. Hanna, 98 Ind. 217; Smith v. Davis, 3 Mont. 109; White v. Tucker, 16 Ohio St. 468; Levy v. Brannan, 39 Cal. 485; Hahn v. Schmidt, 64 Cal. 284; Griffin v. Chubb, 58 Am. Dec. 85 89; Spalding v. Conway, 75 Mo. 510; Hitchcock v. North, 39 Am. Dec. 540. But it must be alleged that the advice of counsel was upon a full presentation of all the facts (Smith v. Davis, 3 Mont. 109), and the advice must be of an attorney learned in the law, not a pettifogger or justice of the peace. Sutton v. McConnell, 46 Wis. 269; Dolbe v. Norton, 22 Kan. 101; Jordon v. R. R., 81 Ala. 220; Donnelly v. Doggett, 145 Mass. 314; Stanton v. Hart, 27 Mich. 539.

[22] Under some authorities the particular grounds showing probable cause should be set up in the answer. Boone, Code Pleading, vol. 2, p. 277, No. 357, citing Brown v. Connelly, 5 Blackf. (Ind.) 390; Schier v. Keown, 34 Wis. 349; Brown v. Ferrari, 1 Disn. (Ohio), 579; Hill v. Palm, 38 Mo. 13. See Moore v. Sanborin, 42 Mo. 49. Justification must be specially pleaded. Boone on Code Pleading, vol. 2, pp. 277 and 278, Nos. 357 to 359, and cases cited; Spear v. Hiles, 67 Wis. 350.

[23] Am. St. Rep. (Souvenir ed.) p. 153. See Am. & Eng. Ency. of Law, vol. 14, p. 46; Israel v. Brooks, 23 Ill. 526; Marks v. Townsend, 97 N. Y. 590; Wheeler v. Nesbitt, 24 How. (U. S.) 544 (and note in L. C. P. Co. ed.); Ritchey v. Davis, 11 Iowa, 126; Addison on Torts (Wood's ed.), secs. 852 and 853, and exhaustive notes. Wright v. Hayter (Kan.), 47 Pac. Rep. 546; Jones v. Jones, 71 Cal. 89; McNulty v. Walker, 64 Miss. 198; Foster v. Pitts, 63 Ark. 387; Epstein v. Berkowsky, 64 Ill. App. 498.

[24] Yocum v. Polly, 1 B. Mon. (Ky.) 358, 36 Am. Dec. 583; Fleckinger v. Wagner, 46 Md. 580; Israel v. Brooks, 23 Ill. 526. Compare Hidy v. Murray (Iowa), 69 N. W. Rep. 1138.

[25] 1 Hilliard on Torts (2 ed.), p. 493, sec. 16; Scullin v. Longfellow, 40 Ind. 23 32; Guffin v. Chubb, 58 Am. Dec. 85. The finding of the examining magistrate that an offense has been committed and that there is probable cause to believe that defendant is guilty thereof is only *prima facie* evidence of probable cause in this action. Ross v. Hixon, 12 L. R. A. 760, and note, 26 Pac. Rep. 955. See Philpot v. Lucas (Iowa), 70 N. W. Rep. 625; Eagleton v. Kambrich, 66 Mo. App. 231.

[26] Garrard v. Willet, 4 J. J. Marsh. (Ky.) 628; Ullman v. Adams, 9 Bush (Ky.), 744; Ross v. Innis, 26 Ill. 259; Adams v. Lisher, 3 Blackf. (Ind.) 445; Stone v. Stevens, 12 Conn. 219.

[27] Commonwealth v. Snelling, 15 Pick. (Mass.) 337; Frowman v. Smith, 12 Am. Dec. 268, note.

[28] Murray v. Long, 1 Wend. (N. Y.) 140; Wade v. Walden, 23 Ill. 369; Wheeler v. Nesbitt, 24 How. (U. S.) 544; Kolka v. Jones (N. Dak.), 71 N. W. Rep. 558.

[29] Murray v. Long, 1 Wend. (N. Y.) 140; Addison on Torts (Wood's ed.), 2 vol. sec. 853; Stewart v. Sonneborn, 98 U. S. 187, note; Lacy v. Porter, 103 Cal. 597, 37 Pac. Rep. 635. See Foster v. Denison (R. I.), 36 Atl. Rep. 93.

[30] Plummer v. Gheen, 14 Am. Dec. 573.

[31] Williams v. Hunter, 14 Am. Dec. 597; Drake on Attachment, p. 729, top, and p. 587. Compare McLaughlin v. Davis, 14 Kan. 168. See Stone v. Swift, 16 Am. Dec. 349; Kirksey v. Jones, 7 Ala. 622; Foster v. Pitts, 63 Ark. 387.

[32] Plummer v. Gheen, 14 Am. Dec. 571; Goldstein v. Foulkes (R. I.), 36 Atl. Rep. 9.

[33] Scotten v. Longfellow, 40 Ind. 23.

[34] Israel v. Brooks, 23 Ill. 527.

[35] Griffin v. Chubb, 58 Am. Dec. 85; Frowman v. Smith, 12 Am. Dec. 266, note; Turner v. Walker, 22 Am. Dec. 329; White v. Tucker, 16 Am. Dec. 468; Schippel v. Norton, 38 Kan. 567; Steed v. Knowles, 79 Ala. 446; Jordan v. R. R., 81 Ala. 220; Donnelly v. Daggett, 145 Mass. 314; Jones v. Jones, 71 Cal. 89, 33 N. W. Rep. 334; Wait's Actions & Defenses, vol. 4 p. 354, sec. 3; Parker v. Parker, 71 N. W. Rep. 421.

[36] Hall v. Suydam, 6 Barb. (N. Y.) 83; Am. & Eng. Ency. of Law, vol. 14 p. 53; Struby v. Keyes (Colo.), 48 Pac. Rep. 663; T. H. & I. R. R. Co. v. Mason (Ind.), 46 N. E. Rep. 332; A., T. & S. F. R. R. v. Brown, 57 Kan. 785; Epstein v. Berkowsky, 64 Ill. App. 498.

[37] Wheeler v. Nesbitt, 24 How. (U. S.) 544; Wells' Questions of Law and Fact, 257; Schofield v. Ferrers, 47 Pa. St. 196.

may be inferred from want of probable cause.[38] Probable cause is defined to be, "the existence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted."[39] The existence of malice is always a question for the jury. The court has no right to find it, nor to instruct the jury that they may return a verdict without it.[40] The question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to show it probably are true, and existed, is a matter of fact; but whether, supposing them to be true, they amount to probable cause, is a question of law.[41] In this action the strict rules of evidence should be enforced,[42] and if a cause of action has not been proved a demurrer to the evidence should be sustained.[43] "In an action for a malicious prosecution, the jury ought to be instructed by the judge as to the law involved in the question of probable cause, *i. e.*, what constitutes a legal excuse for the defendant; and whether the facts relied on in the defense, on the supposition of their being found true by the jury, made out a probable cause.[44] Aside from this special instruction the charge to the jury is not difficult.[45] The damages recoverable in this action will depend on the nature of the prosecution and the proceedings therein. The jury is not confined to actual damages, but they may in the exercise of a sound discretion award exemplary damages, and the plaintiff may recover attorney fees and other incidental expenses to the defense of the former action, but probably not the taxable costs if a judgment has been given him for them.[46] Malice in instituting a prosecution is not inferred as a matter of law, from want of probable cause, but is a question of fact; and, therefore, a special verdict finding want of probable cause, but silent as to malice, will not support a judgment for malicious prosecution.[47]

Kansas City, Mo. D. B. VAN SYCKEL.

[38] Stewart v. Sonneborn, 98 U. S. 187; Paddock v. Watts, 116 Ind. 146; Ventress v. Rosser, 73 Ga. 534; Block v. Meyers, 33 La. Ann. 776; Carson v. Edgeworth, 43 Mich. 241. Compare Strickler v. Greer, 95 Ind. 596; Sharpe v. Johnson, 76 Mo. 660; Am. & Eng. Ency. of Law, vol. 14, p. 47 note; Cooley on Torts (2d. ed.), p. 214; Wright v. Hayter, 47 Pac. Rep. 546. Compare Williams v. Keyes, 47 Pac. Rep. 839. "The law is that malice may be, but is not necessarily, inferred from want of probable cause." Parker v. Parker (Iowa), 71 N. W. Rep. 421; Wright v. Hayter, 47 Pac. Rep. 546.

[39] Wheeler v. Nesbitt, 24 How. (U. S.) 544; Benson v. Bacon, 99 Ind. 156-158; Hays v. Bezzard, 30 Ind. 457-460; Vorse v. Phillips, 37 Iowa, 428; Cooley on Torts (2d ed.), pp. 209 and 210, note; Fagnan v. Knox, 66 N. Y. 525-527; Lacy v. Mitchell, 23 Ind. 67. Ellis v. Simonds (Mass.), 47 N. E. Rep. 116; Johnston v. Meagher (Utah), 47 Pac. Rep. 861.

[40] Stewart v. Sonneborn, 98 U. S. 187.

[41] Stewart v. Sonneborn, 98 U. S. 187; Van Latham v. Libby, 38 Barb. (N. Y.) 343; Kidder v. Parkhurst, 3 Allen (Mass.), 395; Cole v. Curtiss, 16 Minn. 182; Besson v. Southard, 10 N. Y. 236; Stephen on Malicious Prosecution (Text Book Series), p. 57; Cooley on Torts (2d ed.), p. 209; McCormick v. Sisson, 7 Cow. (N. Y.) 715; Drumm v. Cessiuen (Kan.), 49 Pac. Rep. 78; Kolka v. Jones (N. Dak.), 71 N. W. Rep. 558; Stricker v. Pa. R. R. Co. (N. J.), 37 Atl. Rep. 776.

[42] Brown v. Smith, 83 Ill. 291; Am. & Eng. Ency. of Law, vol. 14, p. 58, and notes.

[43] Thaule v. Krekelor, 81 N. Y. 428-433; Fagnan v. Knox, 66 N. Y. 525-527; Hays v. Bezzard, 30 Ind. 457-460; McCormick v. Sisson, 7 Cow. (N. Y.) 715; Masten v. Deyo, 2 Wend. (N. Y.) 424.

[44] Masten v. Deyo, 2 Wend. (N. Y.) 424; Pennsylvania Co. v. Weddle, 100 Ind. 138; Burton v. St. Paul Ry., 33 Minn. 189; Fulton v. Onesti, 66 Cal. 575; Benson v. Bacon, 99 Ind. 156-158; Hays v. Bezzard, 30 Ind. 457-460. Examine Fisher v. Forrester, 33 Pa. St. 501; Goldstein v. Foulkes, 36 Atl. Rep. 9; Williams v. Keyes (Colo.), 47 Pac. Rep. 839.

[45] For general instructions, see Steed v. Knowles, 79 Ala. 446; Frame v. Sewing Machine Co., 31 Fed. Rep. 704; Israel v. Brooks, 23 Ill. 527; Vorse v. Phillips, 37 Iowa, 428; Graham v. Fidelity Assn., 37 S. W. Rep. 995.

[46] Lawrence v. Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Closson v. Staples, 42 Vt. 209, 1 Am. Rep. 316; Fagnan v. Knox, 66 N. Y. 525; Stewart v. Cole, 46 Ala. 646; McWilliams v. Hoban, 42 Md. 56; Ziegler v. Powell, 54 Ind. 173; Reno v. Wilson, 49 Ill. 95. Where no actual damage is suffered, no examplary damages can be recovered. Shippel v. Norton, 38 Kan. 567. Some cases hold that attorney fees are not to be taken into account in estimating damages. Good v. Mylin, 8 Pa. St. 51; Hiches v. Foster, 13 Barb. (N. Y.) 424.

[47] Helwig v. Beckner, 46 N. E. Rep. 644.

CRIMINAL LAW—OBTAINING MONEY UNDER FALSE PRETENSES.

PEOPLE v. BRYANT.

Supreme Court of California, January 15, 1898.

One who induces another to purchase of him a note secured by mortgage by false and fraudulent representations as to the value of the property mortgaged, is, without regard to whether or not the other person recovers his money from the parties to the note, guilty, under Pen. Code, § 532, declaring punishable, as in case of larceny, "every person who knowingly and designedly, by false or fraudulent representations or pretenses, defrauds any other person of money or property."

HARRISON, J.: The superior court sustained a demurrer to the indictment filed herein against

the defendant for obtaining money under false pretenses, and the people have appealed from the judgment entered thereon. It is charged in the indictment that the defendant, intending and designing to cheat and defraud one Harriet E. Hoxie of her money and property, proposed and offered to sell and assign to her a promissory note for the sum of $500, theretofore made to him by one Emma A. Lewis, together with a mortgage, securing its payment, the said mortgage being upon lots 1 and 2, block No. 41, of the Rancho Providencia and Scott tract, and did then and there willfully, knowingly, falsely, fraudulently, and designedly represent and pretend to the said Harriet E. Hoxie that the land covered by said mortgage was good, tillable land, of good soil, and of great value, and fully sufficient as security for the payment of the sum of money mentioned in said promissory note, and did point out and exhibit to her certain lots of land other than those described in the mortgage, which were in fact good and tillable land, and valuable, and sufficient as security for said payment, and did willfully, knowingly, designedly, falsely, and fraudulently represent and pretend to her that these last pieces of land so pointed out by him were the ones described in said mortgage; that the said Harriet E. Hoxie had no knowledge or information of the location of the lots described in said mortgage, or of their character, value, or condition, and that she believed the representations and pretenses so made to her by the defendant, and relied upon the same, and was induced thereby to and did buy the said promissory note and mortgage, and paid to the defendant therefor the sum of $500, her own property and money; whereas, in truth and in fact, the lots described in said mortgage were not good or tillable land, or of any value, or sufficient as security for the payment of any sum of money whatsoever, as the said defendant then and there well knew; and whereas the lots pointed out and represented by him to the said Harriet E. Hoxie to be the lots described in said mortgage were not the lots described in said mortgage, as the defendant then and there well knew; and that each and all and every of the said pretenses and representations made by the defendant to the said Harriet E. Hoxie were false, fraudulent, and untrue, to the then knowledge of the said defendant.

Section 532 of the Penal Code provides: "Every person who knowingly and designedly, by false or fraudulent representation or pretenses, defrauds any other person of money or property, * * * is punishable in the same manner and to the same extent as for larceny of the money or property so obtained." It is contended in support of the demurrer to the indictment that an offense against this provision of the section is not committed unless it appears that the person to whom the representations were made has been deprived of his property by reason of the fraud committed against him; that, as the fraudulent representations charged in this indictment related solely to the property described in the mortgage, and as the mortgage is only a security for the payment of the promissory note, and as it is not charged that the maker of the note is unable to pay the same, or that it has not been paid, the indictment fails to show that she has been defrauded of any of her property. We cannot concur in this construction of the statute. If a person is induced to part with his property by reason of fraudulent pretenses and misrepresentations, he is thereby defrauded of the property so parted with, even though he may eventually make himself whole in some mode not then contemplated. It is not necessary to show that the property has been absolutely lost to him, in order to sustain the charge. He is defrauded of his property when he is induced to part with it by reason of the false and fraudulent pretenses and representations, and the offense is complete when, by means of such false pretenses, the fraud thereby intended is consummated by obtaining possession of the property sought. The man who falsely pretends to be the owner of certain specified property, and by reason of such pretense fraudulently obtains the property of another, is guilty of obtaining that property by false pretenses, notwithstanding the defrauded party may recover the value of the property in a civil action against him. "If the false pretense was among the means by which he obtained the valuable thing, he has committed the full crime, the same as though no other influence combined therewith." 2 Bish. Cr. Law, § 424. In Clark v. People, 2 Lans. 329, where the defendant was charged in the indictment with obtaining property upon the security of his promissory note through false and fraudulent representations as to his ability to pay the same, the court held that it was not necessary that the indictment should show that the note had not been paid, saying: "The allegation that the propery was fraudulently obtained shows that the crime was consummated, and payment of the note after this would not blot out the offense, or atone for its commission. It was not material, therefore, to allege that the note was not paid." See also Skiff v. People, 2 Park. Cr. 139; Com. v. Coe, 115 Mass. 481. In People v. Cook, 41 Hun, 67, the indictment charged the defendant with having sold to the prosecuting witness, and obtained his money therefor, a promissory note, upon the false representation that the maker of the note was not a certain person of the same name, who lived in the same town, and that the prosecutor, being deceived thereby, was induced to pay his money for the note; and to the objection that the indictment was defective in not alleging that anyone was injured by the pretenses, as it did not charge that the real maker of the note was irresponsible, the court said: "Although there is no allegation that the maker of the note was less responsible than the person represented as the maker, yet it charges that the person to whom the representations were made was induced by the false pretenses to part with his money, and that they were made with

intent to cheat and defraud him; and it may be that he was prejudiced. The purpose of the statute is to protect against imposition, and not to permit guilt to depend upon the uncertain determination of the question whether any pecuniary injury resulted in some view which might be taken of the situation. The indictment alleges that the person applied to by the defendant was induced to take the note on the credit of the party who was represented to him as the maker. It cannot be inferred that he would have done so on the credit of the person who had in fact executed the note." Upon the face of the indictment herein it is sufficiently charged that the defendant knowingly and designedly, with the intent and design to cheat and defraud Mrs. Hoxie, made certain false and fraudulent representations to her concerning the value of the security for the note, and that she was induced thereby to, and did, buy the note and mortgage, and paid to him therefor the sum of $500. Whether these representations did in fact induce her to part with her money is one of the elements of the charge to be established by the people at the trial (State v. Fooks, 65 Iowa, 196, 21 N. W. Rep. 561; Therasson v. People, 82 N. Y. 238; Whart. Cr. Law, § 1176; Bish. Cr. Law, § 461); but, if established to the satisfaction of the jury, and shown to have been false and fraudulent, and made by the defendant knowingly and designedly, she was defrauded of her property by the defendant by means of these representations. The judgment is reversed, and the superior court is directed to overrule the demurrer to the indictment.

We concur: Garoutte, J., Van Fleet, J.

NOTE.—*Recent Cases on What Constitutes the Crime of False Pretenses.*—On a trial for obtaining money under false pretenses, defendant cannot be convicted on evidence that he obtained the money by misrepresentations as to the value of a note given as security to the prosecuting witness, when it appears that other notes given at the same time are sufficient to protect the latter from any loss through defendant's fraud. State v. Palmer, 32 Pac. Rep. 29, 50 Kan. 318. Representations that a mortgage on land is sufficient security for a note are mere expressions of opinion, on which a conviction cannot be had. People v. Gibbs (Cal.), 33 Pac. Rep. 630. Defendant induced W to exchange to a confederate a pair of mules, a wagon and a set of harness, worth $200, for two horses and a mare of greatly inferior value, representing that he had sold the horses to another person for $275, to be paid as soon as they were delivered, and that out of such money W would get $200, defendant to take $275 and the mare. The representations were untrue, and made for the purpose of defrauding W: Held, that defendant was guilty of cheating and swindling, as the offense may be committed by false representation of a past or existing fact, although a promise be also a part of the inducement to the person defrauded to part with his property. Thomas v. State (Ga.), 16 S. E. Rep. 94. A prosecution for obtaining money under false pretenses cannot be maintained by reason of representations by a traveling salesman to a customer as to the importance of the house he represented, and the cheapness of its prices compared with others, where the goods sold are as represented. People v. Morphy, 34 Pac. Rep. 623, 100 Cal. 84. An assignment of notes, mortgages, etc., by their owner, accompanied by their delivery, even if intended by said owner to create a trust in her own favor, passes the title as well as the possession, and, if induced by false statements of the assignee, is foundation for a prosecution for obtaining property on false pretenses, rather than for larceny. People v. Martin (Cal.), 36 Pac. Rep. 952. Where the defects in a mare traded were patent, and were known before the trade was concluded, a conviction for swindling is unwarranted, though accused represented the mare to be all right. Rainey v. State (Ga.), 19 S. E. Rep. 892. An indictment alleged that defendants procured one M to sign a note by means of false representations that they were agents of a responsible company, which was engaged in the selling of seed grain; that if M would purchase a certain quantity from them, and give his notes for the price, the company would sell twice the quantity for him the next year at the same price: Held, that the representations by which the note was procured were as to the solvency of the company, and not the promise to sell grain for M. People v. Jeffery (Sup.), 31 N. Y. S. 267, 82 Hun, 409. One who, in selling or exchanging a cow, falsely and with fraudulent intent represent her as having the milk-yielding capacity of three gallons per day, when in fact her capacity was less than one gallon, is a "cheat and swindler," within Code, sec. 4594. Parks v. State, 20 S. E. Rep. 430, 94 Ga. 601. On a prosecution for obtaining money under false pretenses, the fact that the defendant is able and willing to repay the money so obtained is no defense. People v. Oscar (Mich.), 63 N. W. Rep. 971. A complaint which alleges that defendant, for the purpose of obtaining a loan on certain property, represented that there was a house thereon of the value of $1,200, but that in fact there was none, charges a criminal offense. People v. Oscar (Mich.), 63 N. W. Rep. 971. One who, in executing a mortgage in order to obtain credit, falsely stated that his property was unincumbered, was not liable to a prosecution for cheating and swindling, under Code, sec. 4587, where it appeared that the mortgaged property was neither sold nor appropriated to the extinguishment of the senior mortgage. McGhee v. State (Ga.), 22 S. E. Rep. 589. One who obtained a loan of money by falsely representing that he was in the employ of a person of credit, and was entitled to a sum equaling the loan as wages, which such person would shortly pay him, and, by promising, with intent not to fulfill the promise, to repay the loan out of that sum when collected, was guilty of cheating and swindling, under Code, sec. 4587. Branham v. State, 22 S. E. Rep. 957, 96 Ga. 307. 1 Starr & C. St. p. 782, ch. 38, par. 143, sec. 98, which provides a punishment for "every person who shall obtain, or attempt to obtain, from any other person or persons, any money or property, by means or by use of any false or bogus checks, or by any other means, instrument or device, commonly called the confidence game," applies to all cases of swindling in which advantage is taken of the confidence reposed by the victim in the swindler, even though no false or bogus checks or other commercial paper are used. Maxwell v. People, 41 N. E. Rep. 995, 158 Ill. 248. Under Code, sec. 45, subds. 9, 10, making the word "property" embrace real and personal property, and including under personal property "evidences of debt," a non-negotiable draft drawn on an insurance company by its authorized adjuster, in settlement of a claim, subject to the company's approval, is "property," within Code, sec. 4073, punishing any person who obtains

money, goods or property by false pretenses, though such draft be never approved or accepted. State v. Patty (Iowa), 66 N. W. Rep. 727. Where defendant falsely and fraudulently represented to prosecutor that a note in his confederate's possession was given by him in payment for property bought of the confederate, and then in defendant's possession, and the confederate, on the following day, was thereby enabled, with the additional aid of a letter from defendant to prosecutor, wherein the former agreed to pay the note as promised the day before, to trade the note to prosecutor for other property, defendant was sufficiently connected with the transaction of the second day to be liable to indictment for obtaining money under false pretenses. State v. Davis (Kan. Sup.), 42 Pac. Rep. 348, 56 Kan. 54.

JETSAM AND FLOTSAM.

THE MAYOR OF BOSTON ENJOINED.

The injunction issued Jan. 25, 1898, by Judge Richardson, of the Superior Court of Massachusetts, against the mayor of the city of Boston and others, has the distinction of involving at once questions of importance from the three standpoints of politics, law, and equity. Lynch & Woodward v. Josiah Quincy *et al.*, Boston Advertiser, Jan. 26, 1898. The plaintiffs were under contract with the city to make repairs upon the Dover street bath-houses. Failing to carry out a bare promise on their part to employ only union men, a promise which was distinct from the contract, and not enforceable at law, they were ordered, by the authority of the mayor, at the request of the labor unions, to stop work. Police were sent to enforce this order; whereupon the plaintiffs applied for an injunction. A temporary injunction was accordingly granted, by Judge Richardson, which restrained the mayor and the other defendants from further interference.

Commendable or ill-advised as the action of Mayor Quincy may have been, judged by the standards of ethics or politics, that inquiry is beyond the province of the law. Whether the act restrained, however, was a tort, and, if a tort, whether equity had jurisdiction to restrain it, are living questions. The first point the law must answer by saying that Mayor Quincy's act was a legal wrong. The court seems to have been right in holding that his interference was outside the scope of his authority, and not binding upon the city. His act, therefore, is to be looked upon as done in his personal capacity, with the intention of preventing the plaintiffs from completing their contract. Such a prevention is a tort. The usual form of this wrong, it is true, shown by the cases which follow Lumley v. Gye, 2 E. & B. 216, is the prevention of a third person from carrying out his contract obligation to the plaintiff; but upon principle the injury to the plaintiff's contract is the same if he is himself prevented from carrying out his own obligation to the third person. The authority, also, of the United States Supreme Court sanctions the conclusion that the mayor's act was a tort for which he would be liable in damages. Angle v. Chicago, St. P., M. & O. Ry. Co., 151 U. S. 1.

The further question whether equity properly had control over this case gains little light from the authorities. Equity jurisdiction in America has been somewhat abused in cases of strikes and interference with business—cases which should not be followed blindly. The present case, however, differs from them. See Thomas v. Cin., N. O. & T. P. R. R. Co., 62 Fed. Rep. 803. The right infringed when business, so called, is interfered with, is generally the personal right to transact business freely, and in behalf of a personal right equity is slow to interfere. The right to the contract, on the other hand, which is here violated, is a right of property, incorporeal, to be sure, but yet clearly distinguishable from a mere personal right. Equity will not look complacently upon its destruction, or refuse to give negative relief when circumstances show the inadequacy of the remedy at law. Serious difficulty in the present case would be found on assessing the damages at law; this fact alone is a ground on which equity may step in. A current of authority also allows more than ordinary latitude in granting injunctions against persons having public authority who abuse the powers delegated to them. A more fundamental reason, however, for equity jurisdiction may be suggested—a reason nowhere clearly stated, but indistinctly pointed out as the path for the future development of equity. By preventing the plaintiff from completing his contract the mayor would virtually substitute a claim against himself for the claim which the plaintiffs would have against the city on completing the contract; it seems unjust that a doubtful claim against an individual should be held equivalent to the contract claim against the solvent city corporation. For this reason the remedy at law would be inadequate. The credit of the parties, perhaps, may be hard to compare; but equity should be justified in holding that no such tortfeasor can say that the claim against him which arises out of his tort is equivalent to the claim under the contract which he has destroyed.—*Harvard Law Review.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ACCIDENT INSURANCE—Death From Violation of Law.—Where an accident insurance policy provides that it shall not cover accident or death resulting while engaged in fighting, or from intentional injuries inflicted by the insured or any other person, or while violating laws, or by voluntary exposure to unneces-

sary dangers, and the insured comes to his death from a pistol shot fired by another while engaged in a fight brought on by the insured, in open violation of the law, there can be no recovery upon the policy.—MORRIS v. TRAVELERS' INS. CO., Tex., 48 S. W. Rep. 898.

2. APPEAL—Supersedeas—Validity. — A supersedeas bond executed to stay proceedings under a judgment, the right to appeal from which does not at the time exist, is ineffectual, and not binding upon the party executing it.—CITY OF LOUISVILLE v. MULDOON, Ky., 48 S. W. Rep. 866.

3. APPEAL—Time for Taking.—Under Burns' Rev. St. 1894, § 645 (Horner's Rev. St. 1897, § 633), providing that in all cases, except where appellant is under legal disability, appeals must be taken within one year after the judgment is rendered, when an appellant is not under legal disability the record on appeal must be filed in the appellate court, and errors assigned within one year from the rendition of the judgment, and not merely from its entry.—READING v. BROWN, Ind., 49 N. E. Rep. 41.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS—Chattel Mortgages.—A sale or transfer of his property by a debtor, in payment of the debt of a creditor, without making or contemplating a general assignment, although it results in rendering the debts of other creditors uncollectible, is not within the provisions of the statute regulating the making of general assignments for the benefit of creditors, and prohibiting preferences for more than one-third of the assigned estate.—DELANEY v. VALENTINE, N. Y., 49 N. E. Rep. 65.

5. ASSIGNMENT FOR BENEFIT OF CREDITORS—Preferences.—As assignee of an insolvent estate is a trustee for the creditors, and is bound to exercise the utmost diligence and good faith in the discharge of his duties. Under the statute giving the assignee of an insolvent estate the authority to avoid a preference by the assignor, it is within his discretion whether he will attempt to avoid a preference or not.—COLT v. SEARS COMMERCIAL CO., R. I., 38 Atl. Rep. 1056.

6. ATTACHMENT—Dissolution — Liability on Bond.—The liability of sureties on a bond given to dissolve an attachment is not changed by the insolvency and discharge of the principal, unless affected by a statute which applies directly to such bonds.—BERNHEIMER v. CHARAK, Mass., 49 N. E. Rep. 81.

7. ATTACHMENT—Validity of Levy.—Service, upon the person holding property of a defendant, of a copy of a warrant of attachment, bearing no signature of the sheriff or his deputy to authenticate it as a true copy, though it does bear a signed notice that certain property is attached by virtue of the inclosed warrant, is not a substantial compliance with the requirement of Code Civ. Pro. § 649, that property incapable of manual delivery shall be attached by leaving with the person holding it "a certified copy of the warrant;" and a levy attempted to be made by the service of such a copy is invalid.—COURTNEY v. EIGHTH WARD BANK OF BROOKLYN, N. Y., 49 N. E. Rep. 54.

8. BENEVOLENT SOCIETY—Insurance — Payment of Fund into Court.—St. 1886, ch. 281, provides that in all actions in which a liability is admitted by defendant, and the amount is not in dispute, if such amount is claimed by another party than the plaintiff, and the defendant has no interest in the controversy, the court may order such party made defendant, and thereupon the rights of the several parties shall be determined, and that the amount may be paid into court by defendant, and defendant stricken out as a party: Held, that the statute covers an equitable interest arising from the assignment of a certificate of membership in a mutual benefit association.—BRIERLY v. EQUITABLE AID UNION, Mass., 48 N. E. Rep. 1090.

9. BILLS AND NOTES—Burden of Proof.—In a suit on notes indorsed in blank to plaintiff, an answer that there was breach of warranty on the property for which the notes were given, and that they were transferred to plaintiff after maturity, and that the indorsement was fictitious, is sufficient to let in proof of failure of consideration. — RICKER NAT. BANK v. BROWN, Tex., 48 S. W. Rep. 909.

10. BUILDING AND LOAN ASSOCIATIONS—Depositing Securities.—A foreign building and loan association depositing securities with the State treasurer, as provided by Sanb. & B. Ann. St. §§ 2014a, 2014b, for the purpose of doing business in the State, is estopped to question the validity of the trust under which the treasurer holds the securities for the benefit of the members in the State.—LEWIS v. AMERICAN SAVINGS & LOAN ASSN., Wis., 73 N. W. Rep. 793.

11. CARRIERS OF GOODS—Warehousemen—Negligence.—Common carriers may enter into contracts limiting their responsibility, but only when the effect is not to relieve them from the consequences of their negligence or that of their servants, and the contracts are just and reasonable.—COX v. VERMONT CENT. R. CO., Mass., 49 N. E. Rep. 97.

12. CARRIERS OF PASSENGERS — Negligence —Proximate Cause.—Negligence of a railroad company whose conductor puts a passenger, slightly intoxicated, off the train a short distance beyond his station, is not the proximate cause of the passenger's injury, he having gone back to the station in safety, and passed by it onto the bridge of another railroad, where he was killed six hours later, when, if he was still intoxicated, it must have been the result of further drinking.—HAMILTON v. PITTSBURG & L. E. R. CO., Penn., 38 Atl. Rep. 1085.

13. CARRIERS OF PASSENGERS—Punitive Damages.—Before the train stopped at his destination, a passenger had an altercation with the brakeman regarding certain conduct of the former. After the train stopped he continued the altercation with the brakeman on the car platform, thus delaying the train; and the conductor thereupon forcibly jerked him down. There was no altercation between the passenger and the conductor to cause the latter to become angered, and the only reason for the conductor's conduct was the delaying of the train caused by the passenger: Held, that the passenger was not entitled to punitive damages.—SMITH v. PHILADELPHIA, W. & B. R. CO., Md., 38 Atl. Rep. 1072.

14. CARRIERS OF PASSENGERS—Tickets—Conditions.—When a contract for transportation contains a limitation on the back, in order to bind the holder thereof it must be shown that he read or knew of such limitation at the time he accepted the contract.—SAN ANTONIO & A. P. Ry. Co. v. NEWMAN, Tex., 48 S. W. Rep. 915.

15. CARRIERS OF PASSENGERS—Warehouseman—Negligence.—A steamship company received a valise on Saturday for the convenience of one who was to sail on Monday. No contract for carrying the valise was entered into. By a reasonable rule of the steamship company, the valise could not be checked until a ticket should be presented, which was not done until Monday, and at that time the valise could not be found: Held, that the facts showed a liability as a warehouseman, but not as a carrier.—MURRAY v. INTERNATIONAL S. S. CO., Mass., 48 N. E. Rep. 1093.

16. CHATTEL MORTGAGE—Execution.—Under section 3275, St. Okl. 1893, a chattel mortgage must be executed "in the presence of two persons, who must sign the same as witnesses thereto," in order to entitle it to be filed for the purpose of giving constructive notice of its existence; and such mortgage, when executed in the presence of but one subscribing witness, is void as against creditors and subsequent *bona fide* purchasers and incumbrancers of the mortgagor, although the same be deposited with the register of deeds of the proper county for the purpose of being filed.—CAMPBELL v. RICHARDSON, Okla., 51 Pac. Rep. 659.

17. CHATTEL MORTGAGES—Liens—Stocks of Merchandise.—Rev. St. 1895, art. 2548, providing that every mortgage, attempted to be given by the owner of any stock of goods, daily exposed to sale in the regular course of business, and contemplating a continuance of possession of said goods and control of said busi-

ness by sale of said goods by said owner, shall be deemed fraudulent, does not apply to an agreement between a retail merchant and a manufacturer, whereby goods shipped to the merchant are to remain the property of the manufacturer until they are settled for in a manner stipulated in said agreement.—BOWEN V. LANSING WAGON WORKS, Tex., 43 S. W. Rep. 872.

18. CONTRACT—Rescission.—A contract can be set aside for mistake of fact, even though the mistake be not mutual, and it is not necessary that the contract should be induced, or the mistake arise, from the conduct of the other party.—MOORE V. COPP, Cal., 51 Pac. Rep. 630.

19. CORPORATIONS—Assignment for Benefit of Creditors.—A resolution by the directors of a corporation "that the company execute a general assignment to a trustee, to be nominated by the president," impliedly authorizes the president, as the executive officer of the corporation, to execute the assignment, but does not authorize him to select himself as assignee. If, however, he does select himself, his action is voidable only at the election of the corporation itself, and no other party can take advantage of it.—ROGERS V. PELL, N. Y., 49 N. E. Rep. 75.

20. CORPORATIONS—Change in Capital Stock.—Directors of a Kansas corporation have no authority to change the number or par value of the shares of its capital stock as set forth in its charter.—TSCHUMI V. HILLS, Kan., 51 Pac. Rep. 619.

21. CORPORATIONS—Franchise—Abuse.—The act of a corporation in compelling its members, consisting of live stock commission merchants, to employ only three traveling solicitors in certain States, who must be members of the corporation, and be paid a certain stipulated salary, is an abuse of its franchise, empowering it to maintain a commercial exchange to facilitate the receiving and distribution of live stock, and to secure to its members the benefits of co operation in their business.—PEOPLE V. CHICAGO LIVE STOCK EXCHANGE, Ill., 48 N. E. Rep. 1062.

22. CORPORATIONS—Insolvency—Receivers.—A judgment note given by a corporation, heavily in debt, to its treasurer, two months before a receiver was appointed for it, for money then advanced to him for it, on the promise thereof, to enable it to pay wages and freight bills, and thus keep its factory running, and, as it was hoped, survive its difficulties, is not an illegal preference.—COWAN V. PENNSYLVANIA PLATE GLASS CO., Penn., 38 Atl. Rep. 1075.

23. CORPORATIONS—Insolvency—Securing Directors.—Where creditors of a corporation holding its notes on which its directors were indorsers, demanded security as a condition of not instituting proceedings to collect, the confession of judgment in their favor, authorized by the directors at a time when the property of the corporation would have sold for more than its debts, is not fraudulent, though the directors are incidentally relieved from liability.—MUELLER V. MONONGAHELA FIRE CLAY CO., Penn., 38 Atl. Rep. 1009.

24. CORPORATIONS—Liability of Subscriber—Estoppel.—One who acts as a treasurer of a corporation, receives payment of assessments from other subscribers, himself pays certain assessments, and disburses the funds of the corporation in carrying out its main object, is estopped to set up that the stock has not all been subscribed, although at the time of such acts he was ignorant of the deficiency.—MACFARLAND V. WEST SIDE IMP. ASSN., Neb., 73 N. W. Rep. 736.

25. CORPORATIONS—Salaries of Directors.—A director of a corporation cannot, by his own, or the votes of those representing his interest in the directorate, vote and secure to himself an exorbitant salary; but he will be required to act in the utmost good faith, and in the interest of the stockholders whom he represents.—HARRIS V. LEMMING-HARRIS AGRICULTURAL WORKS, Tenn., 43 S. W. Rep. 869.

26. CORPORATIONS—Transfer of Stock—Assignment in Blank.—The pledgee of stock of a private corporation, transferred as collateral security for valid indebtedness, by the delivery of the certificates therefor indorsed in blank, is entitled to protection as against a subsequent attachment thereof for debts of the registered stockholder, though he may have neglected to have such transfer registered on the corporate books.—TOMBLER V. PALESTINE ICE CO., Tex., 43 S. W. Rep. 896.

27. COUNTIES—Bridges—Contracts for Construction.—The power to build bridges is not incident to the power to establish highways, as complete provision is made by statute for building bridges, whether wholly in one county or across boundary lines.—WROUGHT IRON BRIDGE CO. V. BOARD OF COMRS. OF HENDRICKS COUNTY, Ind., 48 N. E. Rep. 1050.

28. COUNTIES — Claim against.—Under Acts 24th Gen. Assem., ch. 37 (providing, "A bounty shall be allowed on the skin of a wolf," of a certain amount, to be paid out of the treasury of the county in which the animal was taken, "on the certified statement of the facts, together with such other evidence as the board of supervisors may demand showing the claimant entitled thereto)," the facts being without dispute in claimant's favor, the supervisors have no discretion to disallow the claim; and, doing so, it may be enforced in a court of law.—BOURRETT V. PALO ALTO COUNTY, Iowa, 73 N. W. Rep. 838.

29. COUNTIES—Unauthorized Contract of Commissioners.—Where a board of county commissioners enter into a wholly unauthorized contract—one outside of and in excess of their limited statutory powers—it is not binding upon the county, although its terms and conditions have been performed and complied with by the other party thereto.—BAZILLE V. BOARD OF COMRS. OF RAMSEY COUNTY, Minn., 73 N. W. Rep. 845.

30. COUNTY BONDS—Issuance—Validity.—Under Const. art. 11, § 7, providing that no debt shall be incurred by any city or county unless provision is made for levying and collecting a sufficient tax to pay the interest, and providing at least 2 per cent. as a sinking fund, must be made at the time of creating the debt or previously, by which the rate of tax to be levied shall be so definitely fixed that it is merely a ministerial act to determine it.—MITCHELL COUNTY V. CITY NAT. BANK OF PADUCAH, KY., Tex., 43 S. W. Rep. 881.

31. COURTS—Jurisdiction.—In order to enable a defendant to object to the jurisdiction of the court over his person, the objection must be made at the earliest opportunity of the party. If, before making such objection, the party appears and makes a motion that the plaintiff be required to attach an account of the items of his claim to his petition, or that he be required to separately state and number his causes of action, or that he be required to strike certain matter from his petition, in either of these cases the party voluntarily submits himself to the jurisdiction of the court, and he cannot afterwards be heard to object thereto.—LONG V. NEWHOUSE, Ohio, 49 N. E. Rep. 79.

32. CREDITORS' BILL—Sufficiency.—A bill to set aside a conveyance as in fraud of creditors, on the ground that it was without consideration, need not allege that the grantee had knowledge of complainant's judgment, or had a fraudulent intent.—FIRST NAT. BANK OF SHREVEPORT V. RANDALL, R. I., 38 Atl. Rep. 1055.

33. CRIMINAL EVIDENCE — False Pretenses — Joint Offenders.—Where two persons were accused of jointly obtaining a note by falsely representing it was a contract to sell machines in certain districts where the power to sell such right was claimed, it was not error to admit testimony that the accused parties were acting together, and had so acted in similar transactions with others, wherein they sold the right to the same district, the evidence being competent to throw light upon the purpose and intent of those accused in the transaction in question.—PEOPLE V. SUMMERS, Mich., 73 N. W. Rep. 818.

34. CRIMINAL LAW—Embezzlement.—Code 1873, § 3908, provides that public officers who shall convert to their

own use money intrusted to them shall be guilty of embezzlement. Section 4314 abrogates the distinction between an accessory before the fact and a principal, and all persons concerned in the commission of a public offense must be indicted and punished as principals: Held, that one who advises a county treasurer to commit the crime of embezzlement may be a principal, as having aided and abetted in its commission, though he would not have been a principal if he had taken the money.—STATE v. ROWE, Iowa, 73 N. W. Rep. 883.

35. CRIMINAL LAW—Embezzlement—Aiding in Same.—By section 124 of the Criminal Code, any person who advises, aids, or participates in the embezzlement of public money by the officer or person charged with the collection, receipt, safe keeping, transfer, or disbursement of such money is himself guilty of embezzlement. The words "any person" refer to all, and are not confined in meaning to a person or persons, or officer or officers, in some manner intrusted with the collection, handling, or care of public money.—MILLS v. STATE, Neb., 73 N. W. Rep. 761.

36. CRIMINAL LAW—Embezzlement by State Treasurer.—A State treasurer, who for an unauthorized purpose draws a check on a State depository bank having money of the State therein, which he delivers to the payee with intent to defraud the State, and the bank, on presentation of the check, places the amount thereof to the credit of a third party, whom the payee represents in the transaction, and at the same time charges the account of the State with a like sum, is guilty of the embezzlement of the money of the State, within the meaning of section 124 of the Criminal Code. —BARTLEY v. STATE, Neb., 73 N. W. Rep. 745.

37. CRIMINAL LAW—False Pretenses—Municipal Officers.—It is no defense to an indictment against a city official for obtaining money by false pretenses, by representing that false returns of amounts due from the city are true, that, because the returns went through the hands of other officials for approval, the city ought to have discovered the discrepancy.—COMMONWEALTH v. MULREY, Mass., 49 N. E. Rep. 91.

38. CRIMINAL LAW—Homicide—Burden of Proof.—An instruction that, after a killing had been proved to the satisfaction of the jury beyond any reasonable doubt, the legal presumption of malice being raised by the unexplained killing, the burden of proof shifts to defendant, is erroneous, as the burden of proof in such cases never shifts.—HERMAN v. STATE, Miss., 22 South. Rep. 873.

39. CRIMINAL LAW — Municipal Officers — Bribery.—Where one is distinctly charged, under Pub. St. ch. 205, § 9, as amended by St. 1891, ch. 349, with corruptly giving a municipal officer a gift, with intent to influence his vote upon a matter which may by law come before him in his official capacity, it is not necessary, as against the accused, who held an office, in seeking to retain which he committed the offense, to allege in the indictment that he held said office at the time the offense was committed.—COMMONWEALTH v. DONOVAN, Mass., 49 N E. Rep. 104.

40. CRIMINAL PRACTICE—Burglary—Indictment.—An indictment charging the burglarious breaking and entering of a dwelling house, "with willful, felonious and burglarious intent, then and there to commit some crime, to the jurors aforesaid unknown," is fatally defective, in that it does not specify what specific crime the accused intended to commit.—STATE v. BUCHANAN, Miss., 22 South. Rep. 875.

41. DAMAGES — Personal Injuries.—Mental anguish arising from apprehension as to the future support of one's family, as the probable result of injuries received, and the fact that rent would soon be due, cannot be considered as the result of a personal injury, in estimating the damages.—PLANTERS' OIL CO. v. MANSELL, Tex., 43 S. W. Rep. 913.

42. DEATH—Presumption.—The presumption of death the owner of a lot in Chicago in 1870 was not shown by evidence that he was in the army during the war; that he had lived in two States other than Illinois, and one territory, and only occasionally visited Chicago; that he was absent from Chicago after the fire; that a sister living there, who could neither read nor write, had received no letters from him for more than seven years; and that he could not be found in one of the places where he had lived. — HITZ v. ALGREEN, Ill., 48 N. E. Rep. 1068.

43. DOWER OF WIDOW—Husband's Debts.—The lands of a husband, during his life, are subject to his wife's inchoate right of dower therein; and, at the instant of his death intestate, the law transmutes the inchoate dower lien into an absolute dower estate, subtracts it from the lands of the intestate, and vests the right thereto in his widow.—MOTLEY v. MOTLEY, Neb., 73 N. W. Rep. 738.

44. EASEMENT—Right of Way—Prescription.—In order to acquire a prescriptive right of way, it is necessary that, in going across the land to any particular point, or for any particular purpose, a particular route be used, and not such route as at the time seems most convenient. — HOYT v. KENNEDY, Mass., 48 N. E. Rep. 1073.

45. EASEMENT — Way of Necessity — Partition. — When land is partitioned, in an action for thatpurpose, between two heirs, and to one of the heirs is allotted a portion thereof, without any access to the public highway, such heir is entitled to a way of necessity over the land allotted to the other, which extends to the public highway, although no provision was made therefor in the report of the commissioners or decree of the court.—RITCHEY v. WELSH, Ind., 48 N. E. Rep. 1031.

46. EMINENT DOMAIN — Remedies of Owner. — Under Rev. St. § 1852, providing that a railroad company possessing land to which it either has no title or a defective title, or a party interested in the land, may bring condemnation proceedings to have the compensation ascertained and the title perfected, one who permits a railroad company to construct and operate its road on his land thereby waives all remedies for its recovery or for injuries to it.—HOOE v. CHICAGO, M. & ST. P. R. CO., Wis., 73 N. W. Rep. 787.

47. EVIDENCE — Damages — Res Gestæ.—In an action for damages for personal injuries, testimony of a physician of complaints made by plaintiff at the various times he was examining him of "a roaring, dull, aching pain in the head, more especially in the back of the head," is not hearsay, such complaints being part of the *res gestæ*. — WHEELER v. TYLER S. E. RY. CO., Tex., 43 S. W. Rep. 876.

48. FEDERAL COURTS—Supreme Court—Jurisdiction.—A suit on an assigned chose in action was dismissed by the circuit court because the only ground of jurisdiction was diverse citizenship, and plaintiff had failed to show that his assignor could have maintained the suit. This decision was affirmed by the circuit court of appeals: Held, that the decree of affirmance was final, under section 6 of the act of March 3, 1891, because the case was one "dependent entirely upon the opposite parties to the suit or controversy" being citizens of different States, and, hence, that the supreme court had no jurisdiction of an appeal therefrom. — BENJAMIN v. CITY OF NEW ORLEANS, U. S. S. C., 18 S. C. Rep. 298.

49. FRAUDS, STATUTE OF — Consideration—Parol Evidence.—Parol evidence to show that the consideration of a written agreement to pay what may be due on the note of a third party was the satisfaction of a mortgage made by the latter is not admissible to take such agreement out of the operation of Code 1886, § 1732, subd. 3, which provides that a promise to answer for the debt of another is void unless in writing, expressing the consideration. — LINDSAY v. MCRAE, Ala., 22 South. Rep. 868.

50. FRAUDS, STATUTE OF — Oral Contract. — The mere delivery of personal property to a carrier designated

by the buyer does not authorize the carrier to accept it, so as to take an oral agreement for the sale of it out of the statute of frauds.—WAITE v. MCKELVY, Minn., 73 N. W. Rep. 727.

51. FRAUDULENT CONVEYANCES—Bona Fide Mortgagee — Notice. — One who, for the purpose of delaying and hindering creditors, places the title to land in another, cannot invoke the doctrine that possession is notice of his rights to such property as against a *bona fide* mortgagee.—ALLIANCE TRUST CO. v. O'BRIEN, Oreg., 51 Pac. Rep. 640.

52. FRAUDULENT CONVEYANCES — Consideration. — A creditor has a right to secure himself by a conveyance from an insolvent debtor, even though the effect is to hinder and delay other creditors, the transaction being free from fraud.—CATHCART v. GRIEVE, Iowa, 73 N. W. Rep. 835.

53. FRAUDULENT CONVEYANCES — Judgment by Confession.—A judgment confessed by an insolvent to secure a *bona fide* creditor, though it be intended to, and has the effect of, giving him a preference over other creditors, is not fraudulent in law. — BRADEN v. FIRST NAT. BANK OF CLARION, Penn., 38 Atl. Rep. 1023.

54. GARNISHMENT — Burden of Proof. — Where the garnishee denies under oath any liability to the principal defendant, the burden is on plaintiff to show the contrary. — PAYNE v. CHICAGO, R. I. & P. R. CO., Ill., 48 N. E. Rep. 1053.

55. GARNISHMENT — Successive Garnishments. — The use of the process of the court, in garnishee proceedings, to tie up money in the hands of the garnishee by repeated service of writs, and then, without entering the writ or writs employed for this purpose, to commence a fresh suit, and attach the fund thus accumulated, is a perversion of civil process, and cannot be sanctioned.—MCNALLY v. WILKINSON, R. I., 38 Atl. Rep. 1053.

56. HIGHWAYS—Remonstrance. — If, on a trial before a board of county commissioners of a remonstrance for damages on the location of a highway, the petitioners make no objection to the sufficiency of the remonstrance, and also fail to do so on an appeal of the case to the circuit court, they waive all objections to the remonstrance in that it did not allege specific damage, and evidence of specific damage is admissible.—LAKE ERIE & W. R. CO. v. SPIDEL, Ind., 48 N. E. Rep. 1042.

57. HOMESTEAD — Platting. — The mere fact that the owner of a rural homestead plats it, or any part thereof, into lots, without dedicating the streets shown on the plat to the public, does not affect his homestead rights in any part thereof. Nor does the sale of a part of such lots affect such rights in any part of the original tract remaining unsold, provided the contiguity of what remains is preserved. — PHELPS v. NORTHERN TRUST CO., Minn., 73 N. W. Rep. 842.

58. INJUNCTION—Jurisdiction—Violation.—An injunction erroneously granted by a court having jurisdiction of the parties and of the subject-matter must be implicitly obeyed, as long as it exists. It is voidable only on motion to vacate.—STATE v. CIRCUIT COURT OF GREEN LAKE COUNTY, Wis., 73 N. W. Rep. 788.

59. INSURANCE — Cancellation of Policy. — In the absence of an agreement by the insurer to return premiums paid, the assured cannot recover therefor when the insurer refuses to receive any more premiums, and wrongfully cancels the policy. — METROPOLITAN LIFE INS. CO. v. MCCORMICK, Ind , 49 N. E. Rep. 44.

60. INSURANCE—Waiver of Conditions.—Where an insurance policy contains a provision to the effect that it shall be void if the title of the assured to the property covered by the policy is other than sole and unconditional, if the agent who solicits the insurance, receives and transmits the application, delivers the policy and receives the premium, knows at the time of such delivery that the title of the assured is other than sole and unconditional, the provision in that regard is waived; and such is the case notwithstanding the policy also contains a provision prohibiting the agent from waiving any of its conditions, except in writing upon or attached thereto. — TRUSTEES OF ST. CLARA FEMALE ACADEMY v. NORTHWESTERN NAT. INS. CO., Wis., 73 N. W. Rep. 767.

61. JUDICIAL NOTICE—Census.—The courts of Indiana take judicial notice of a census or other enumeration made under the authority of the State or of the United States. — CITY OF HUNTINGTON v. CAST, Ind., 48 N. E. Rep. 1025.

62. JUDGMENTS—Community Property.—A judgment against a husband for a community debt is, as against the husband's interest in community land, superior to a prior judgment in favor of the wife, in a divorce suit, on the ground that he had used community property, to the amount of such judgment, in excess of his half interest, since the community estate is liable for community debts. — GHENT v. BOYD, Tex., 43 S. W. Rep. 891.

63. JUDGMENT — Infants — Guardian. — A judgment against a minor who had no guardian, and for whom no guardian *ad litem* was appointed, will be reversed. —CONTO v. SILVIA, Mass., 49 N. E. Rep. 86.

64. LANDLORD AND TENANT — Covenants.—Where a lease contains a covenant on the part of the lessor to make repairs upon the leased premises, and there has been a breach of this covenant, the lessee may himself make the improvements and recover the expense from the lessor, or, without making them, he may recover from the lessor an amount representing the consequent diminution in the rental value of the leased property.—ROSS v. STOCKWELL, Ind., 49 N. E. Rep. 50.

65. LANDLORD AND TENANT—Leases—Covenant to Renew.—A general covenant in a lease to extend or renew implies an additional term equal to the first, and upon the same terms, including that of rent, except the covenant to renew.—KOLLICK v. KAISER, Wis., 73 N. W. Rep. 776.

66. LANDLORD AND TENANT — Oil Leases.—The owner of a farm made leases for oil purposes, reserving as royalty one-eighth of the oil produced. His son, who was of full age, and living on the farm with his father, was joined with the latter as a colessor. The oil reserved as royalty was delivered to the father and his vendees: Held, in an action by the son against the lessees to recover one-half the royalties, that defendant might show the circumstances under which plaintiff signed the leases, not to deny his landlord's title, but to deny that, as to the son, the leases created that relation.—SWINT v. MCCALMONT OIL CO., Penn., 38 Atl. Rep. 1021.

67. LANDLORD AND TENANT—Repairs.—In the absence of stipulation or covenant on the subject in a lease of a building, no obligation on the part of the landlord is implied, nor any warranty, that the premises are, or will continue to be, suitable for the lessee's use or business, or safe from exposure to danger from the elements through the landlord's omission to make repairs. This rule also extends in like manner to parts of the premises not expressly demised to the tenant, but which may be necessary to his convenience or protection; as, in this case, the common roof.—HANLEY v. BANKS, Okla., 51 Pac. Rep. 664.

68. LIFE INSURANCE — Misrepresentations of Insured. —In an action on a life policy, whether insured was in sound health at the time the policy was issued is a question for the jury, where there is a positive conflict in the evidence as to his health at that time.—SMITH v. METROPOLITAN LIFE INS. CO., Penn., 38 Atl. Rep. 1039.

69. LIMITATIONS — Payment of Interest.—A testator directed that all his debts be paid as soon after his decease as possible, and that all his property be sold, and converted into money; and he granted his executors five years in which to make sale of his "estate as aforesaid:" Held, that there was no express trust to sell for payment of debts, and hence such provision in the will did not prevent limitations from running

against testator's debts during such five years.—HEMPHILL v. PRY, Penn., 38 Atl. Rep. 1020.

70. LIMITATION OF ACTIONS — Trust Fund.—A woman servant, from time to time, through a series of years, deposited money saved from her earnings with her second cousin, at his request, who was to keep it for her until she wanted it. He was a man of property, and the money was left with him in preference to depositing it in a bank. Afterwards he gave her a memorandum of the amount so left with him: Held, that her cause of action, in the sense of a present right to maintain a suit, did not accrue until she had demanded the money, and the statute of limitations did not begin until after such demand.—CAMPBELL v. WHORISKEY, Mass., 48 N. E. Rep. 1070.

71. MANDAMUS—Civil Service.—Civil service commissioners may be compelled by *mandamus* to bring within the operation of the civil service act, by a proper classification thereof, such positions as may be judicially determined to be included by its provisions.—PEOPLE v. KRAUS, Ill., 48 N. E. Rep. 1052.

72. MANDAMUS — State Board of Examiners.—Where the constitution provides a board for the examination of claims against the State, and such board, for an unreasonable time, delays action upon a claim presented, while a writ of mandate will issue to require said board to proceed and pass upon such claim, the court has no jurisdiction to direct how such board shall act.—PYKE v. STEUNENBERG, Idaho, 51 Pac. Rep. 614.

73. MARRIED WOMAN — Pledge of Separate Estate—Mortgage.—The making of further advances to the husband is a sufficient consideration to sustain a mortgage by the wife of her separate property to secure an antecedent debt. In such case the repayment of the subsequent advances does not discharge the mortgage.—LINTON v. COOPER, Neb., 78 N. W. Rep. 731.

74. MARRIED WOMEN — Sole Trader.—Where a wife owned cord wood, which she intended to sell in the market, and which was on her land where it had been cut, 10 miles from her farm, which she was managing on her separate account, it cannot be said as a matter of law that the wood was properly employed in her business of farming, within Pub. St. ch. 147, § 11, providing that property employed by a wife in doing business on her separate account shall be liable for her husband's debts, unless she records a certificate.—AYER v. BARTLETT, Mass., 49 N. E. Rep. 82.

75. MASTER AND SERVANT—Negligence—Instructions.—A brakeman, while riding on top of a moving train, was struck by an overhanging spout attached to a water tank. The court charged that the degree of care of all parties was higher when the life and limbs of themselves and others were endangered than in ordinary cases: Held erroneous, as requiring a greater degree of care to be exercised by the company toward the brakeman, who was in danger, than toward another employee, who was not in such danger.—GALVESTON, ETC. RY. CO. v. GORMLEY, Tex., 43 S. W. Rep. 877.

76. MASTER AND SERVANT — Torts of Servant.—A contractor is not liable for injury caused by brick falling from a properly constructed wall, which, although not permanently, is temporarily, completed, through the intentional or negligent act of an employee not acting within the scope of his employment, though proper scaffolding or guards to prevent brick from falling have not been erected.—MAYER v. THOMPSON-HUTCHINSON BLDG. CO., Ala., 22 South. Rep. 859.

77. MECHANICS' LIENS — Foreclosure.—Rev. St. 1894, § 7260 (Rev. St. 1881, § 5298), provides that a sale in foreclosure of a mechanic's lien shall be without prejudice to the rights of any prior incumbrancers, owners, or other persons not parties to the action: Held, that where a prior mechanic's lien holder forecloses within the time allowed, and joins in the action the owner of the property, but not a junior mortgagee, the latter cannot, either under said statute or independent of it, foreclose his mortgage without regard to the rights of the purchaser at the sale under the prior lien, and this although the time for foreclosing the lien has expired.—DEMING-COLBURN LUMBER CO. v. UNION NAT. SAVING & LOAN ASSN., Ind., 49 N. E. Rep. 28.

78. MECHANICS' LIENS — Prohibition in Contract.—Provision in contract between owner and contractor that "no lien shall be filed by either the contractor or subcontractors" is binding on subcontractors, notwithstanding a provision that, if required by the owner, the contractor shall, before being paid, give evidence that the premises are free from liens, and that, if there shall be a lien, the owner may retain enough to indemnify against it.—MORRIS v. ROSS, Penn., 38 Atl. Rep. 1084.

79. MECHANICS' LIENS — Notice — Tacking Claims.—Where materials for a building were furnished in part to the contractor and in part to his subcontractor, and the notice of lien was filed by the material-man after the expiration of the statutory period of limitation as to one of such bills, but within such period as to the other, the assignee of the lienor may tack such expired claim to that of later date, and avoid the statutory limitation.—TRUEBLOOD v. SHELLHOUSE, Ind., 49 N. E. Rep. 47.

80. MORTGAGE—Subrogation — Contribution.—One of two joint makers of a note secured by a mortgage paid the same before maturity: Held, that the payment of the debt acted as an equitable assignment to him of the mortgage, and that he was subrogated to the rights of the original creditor, as against his comaker, for the latter's share of the debt.—TRUSS v. MILLER, Ala., 22 South. Rep. 863.

81. MUNICIPAL CORPORATIONS — Claims — Actions.—Madison City Charter (Laws 1882, ch. 36), provides, in subchapter 7, §§ 25-28, that no action shall be maintained against the city until the claim has been presented to, and disallowed by, the common council, and then only by an appeal to the circuit court: Held, that a claimant could bring an action against the city when the common council had failed for five months to act upon his claim.—KRAFT v. CITY OF MADISON, Wis., 73 N. W. Rep. 775.

82. MUNICIPAL CORPORATIONS—Defective Streets.—A city is not guilty of negligence because it maintains open gutters of suitable size at street crossings, where that is a common, approved method of construction.—CANAVAN v. CITY OF OIL CITY, Penn., 38 Atl. Rep. 1096.

83. MUNICIPAL CORPORATIONS—Defective Sidewalk.—If the owner of a lot abutting upon a street of a municipality, for the use of his property, constructs a vault under the sidewalk, over which he negligently places and maintains a defective covering, he is liable directly to a footman injured thereby notwithstanding the omission by the municipality of the duty imposed upon it by statute to keep the street in repair.—MORRIS v. WOODBURN, Ohio, 48 N. E. Rep. 1097.

84. MUNICIPAL CORPORATIONS—Fencing Dangerous Places.—Along the side of a public street in St. Paul is a steep precipice, the edge of which is within the line of the street as dedicated. Between such edge and the sidewalk the city maintained a fence 3 1-2 feet high, with one board nailed flat on the top of the posts and two boards on the sides of the posts, the spaces between the boards being about 10 inches wide. A child 5 1-2 years old crawled through or climbed over the fence, fell over the precipice, and was killed. In an action to recover for the wrongful death, held, the city was not negligent in failing to maintain a higher or closer fence, or one that a child could not surmount, and plaintiff cannot recover.—LINEBURG v. CITY OF ST. PAUL, Minn., 78 N. W. Rep. 723.

85. MUNICIPAL CORPORATIONS — Purchase of Land—Taxation.—Where a city acquires land for municipal purposes, such property, when appropriated to public purposes, is exempt from taxation.—CITY OF SOMERVILLE v. CITY OF WALTHAM, Mass., 48 N. E. Rep. 1092.

86. MUNICIPAL CORPORATIONS—Sewers—Release from Special Assessment.—An agreement by a city to release

a property owner from general taxation for maintenance of sewers, in consideration of permission to construct a sewer through his land, is void.—COIT V. CITY OF GRAND RAPIDS, Mich., 73 N. W. Rep. 811.

87. MUNICIPAL IMPROVEMENTS—Lien.—A lien on land outside of an incorporated city for grading and curbing a street in front thereof can neither be acquired nor enforced under Code Civ. Proc. § 1191, providing for a lien on a lot in front of which such work is done "in an incorporated city."—DURRELL V. DOONER, Cal., 51 Pac. Rep. 628.

88. NEGLIGENCE — Proximate Cause.—Where one maintains a pile of refuse and slack from a mine near a highway, for a number of years, knowing that it is continually taking fire and burning at the bottom, and sliding down from above, he is liable for damages for a runaway caused by a horse being frightened by a sliding in the pile.—ISLAND COAL CO. V. CLEMMITT, Ind., 49 N. E. Rep. 88.

89. OFFICE AND OFFICERS — Constitutional Law—Incompatible Offices.—Under Const. art. 2, § 9, providing that no person shall hold more than one lucrative office, except deputy postmasters, when their compensation does not exceed $90 per annum, the acceptance of the office of postmaster, the salary of which exceeds the constitutional exception, by a person holding the office of township trustee, operates as a surrender or resignation of the latter office.—BISHOP V. STATE, Ind., 48 N. E. Rep. 1038.

90. OFFICERS — Residence.—Under Const. art. 6, § 6, declaring that all county officers shall reside within their respective counties, the residence must be actual, and a county commissioner who removed with his family to another State, where he subsequently resided with his family, prosecuting his usual occupation, and where he located his residence for an indefinite time, abandoned his office.—RELENDER V. STATE, Ind., 49 N. E. Rep. 30.

91. PARTITION—Parol Agreement.—Where tenants in common make a parol partition, the presumption is it included the whole land, the coal as well as the surface; and if one claims that the partition was only as to the surface, and did not include the coal, the burden is on him to show that fact.—BYERS V. BYERS, Penn., 38 Atl. Rep. 1027.

92. PARTNERSHIP—Mortgage by One Partner.—A partner may execute a mortgage on behalf of the firm, to secure a firm debt, without the consent of the other partners.—BECKMAN V. NOBLE, Mich., 73 N. W. Rep. 803.

93. PARTNERSHIP REALTY—Conversion.—The English rule that all real estate forming part of the property of a partnership is converted out and out into personalty, has not been adopted in this State, but the clear current of American decisions supports the rule that, in the absence of agreement to the contrary, partnership real estate retains its charter as such, for all purposes, and as between all parties, except that each partner's share is impressed with a trust in favor of the other that, so far as necessary, it shall be first applied to the adjustment of partnership obligations, and payment of any balance found due from one partner to the other, and, subject to such trust, the share of each partner descends to his heirs.—DARROW V. CALKINS, N. Y., 49 N. E. Rep. 61.

94. PLEDGES—Delivery.—An asphalt company gave a creditor a note, which, after the usual promise, recited that certain named property had been "deposited as collateral," "in our yard at N, Pa., which we agree to save harmless for the payment of this note:" Held, that the pledge was not good against the company's receiver, where the pledgor did not deliver the goods, the pledgee did not remove them or take possession of them either actually or constructively, and they were not even separated, marked, or in any way distinguished from the company's unpledged assets.—IN RE JOHNSON, Penn., 38 Atl. Rep. 1029.

95. PRINCIPAL AND AGENT—Agent's Liability to Principal.—An agent with full power to sell and convey, but who, without fraud, exceeds his authority, and accepts bonds instead of money in payment, is liable only for the market value of the lands, though a greater price is recited in the deed; this being fictitious, and obtained only by reason of the agreement to accept in payment the bonds of doubtful value.—PAUL V. GRIMM, Penn., 38 Atl. Rep. 1017.

96. PRINCIPAL AND AGENT—Payment—Authority.—An agent employed by his principal "as traveling salesman, and soliciting work and orders of all kinds and descriptions" done by the principal in the line of its business, all orders to be subject to the principal's acceptance, who has no express authority to make collections for his principal, and who has not been held out by the principal as possessing such authority, has no implied power to collect the amount due his principal for printed circulars, for which the agent takes and forwards an order addressed to his principal, and which are subsequently delivered by a carrier, and not by the agent.—LAKESIDE PRESS & PHOTO-ENGRAVING CO. V. CAMPBELL, Fla., 22 South. Rep. 878.

97. PRINCIPAL AND SURETY—Mortgages—Assumption by Grantee.—A grantee of mortgaged premises, who assumes the mortgage debt, is liable thereon as principal debtor, and may be sued thereon without foreclosure of the mortgage.—STITES V. THOMPSON, Wis., 73 N. W. Rep. 774.

98. PRINCIPAL AND SURETY—Official Bonds—Release of Sureties.—The failure of the levy court to obey Laws 1877, p. 898, entitled "An act in relation to the liability of principal and surety," requiring them, on application of the sureties on a defaulting county tax collector's bond, to take from such collector the power to collect uncollected taxes, and to appoint another collector, will not release such sureties, as sureties in official bonds of public officers are not discharged because loss to them occurs through the omissions of other public officers.—STOECKLE V. LEWIS, Del., 38 Atl. Rep. 1059.

99. QUO WARRANTO—Private Persons.—An information in the nature of *quo warranto* cannot be brought by private persons in their own names, except in cases authorized by Pub. St. ch. 186, §§ 17-25, which provide that "any person whose private right or interest has been injured, or is put in hazard by the exercise by a private corporation, or by persons claiming to be a private corporation, of a franchise or privilege not conferred by law, may apply to the supreme judicial court for leave to file an information in the nature of a *quo warranto*," and that "nothing contained in this chapter shall deprive any person of the right to file an information respecting the election or admission of an officer or member of a corporation."—HAUPT V. ROGERS, Mass., 48 N. E. Rep. 1080.

100. RAILROAD COMPANY—Crossing by Street Railway at Grade.—Where the charter of a street railway company provides that it may cross any track of any railroad, provided that it conform to the grade of the track to be crossed, injunction will not lie at the instance of a steam railway company to prevent said street railway company, operating by electricity under the trolley system, from stretching or extending its trolley wires over, or from operating its line of street railway at grade across, the tracks of the steam railway company at a street crossing in a city.—PHILADELPHIA, W. & B. R. CO. V. WILMINGTON CITY RY. CO., Del., 38 Atl. Rep. 1067.

101. RAILROAD COMPANY—Street Crossing over Tracks—Failure on the part of an incorporated town to enact an ordinance for the improvement of its streets, and to fix the grade thereof, did not relieve a railroad company of the duty imposed on it by law to properly construct the crossings over its tracks, where they crossed the streets of such town.—EVANSVILLE & T. H. R. CO. V. STATE, Ind., 49 N. E. Rep. 2.

102. SALE—Conditional Sales—Assignment. — An assignment of a contract for the payment of the price of goods therein set forth, which contains the conditions on which the promisor may retain the property and

obtain a perfect title thereto, carries with it the right of property and possession for condition broken, whether default occurred before or after the assignment.—LANDIGAN v. MAYER, Oreg., 51 Pac. Rep. 649.

103. SALE—Contracts—Mistake.—A buyer, who, after being informed of a mistake in a price quotation of merchandise shipped to him, and of the figure the seller intended to quote, receives and disposes of the merchandise, will be liable at the price intended to be quoted.—MUMMENHOFF v. RANDALL, Ind., 49 N. E. Rep. 40.

104. SALES—Evidence of Guaranty.—Sales made by "sale memorandums," which contain no guaranty, and show the sales to have been by sample, do not admit of evidence that they were made with guaranty of quality.—VIERLING v. IROQUOIS FURNACE CO., Ill., 48 N. E. Rep. 1069.

105. SALE—Lien on Personalty.—Pub. St. ch. 192, §§ 24, 25, provide for the sale of personal property on which there is a lien for work and labor, or for money expended, if the amount due is not paid within 60 days after demand; and also provide for notice of the intended sale to the "owner" of the property: Held, that a person who, with the consent of the owner of the goods, stores them as his own, is an "owner," within the act, and notice to him of the intended sale is sufficient.—KEITH v. MAGUIRE, Mass., 48 N. E. Rep. 1090.

106. SALES—Rescission for Fraud.—A vendor who seeks to rescind a contract of sale on the ground of fraud must do so *in toto;* he cannot affirm in part, and disaffirm it as to the residue; and, where he received money, he must return or offer to return it.—FRIEND BROS. CLOTHING CO. v. HULBERT, Wis., 73 N. W. Rep. 784.

107. STATUTES—Construction.—Where words in a legislative enactment have been construed by the court, the legislature, in using the same words in a subsequent statute on the same subject-matter, must be presumed to have intended to employ them in the same sense.—COOPER v. YOAKUM, Tex., 43 S. W. Rep. 871.

108. STATUTE—Revision of—Qualifying Clause.—Where, in the course of a general revision of the statutes of a State, a clause is added to a section thereof, the plain and obvious effect of which clause, according to its ordinary meaning, is to qualify the former operation of such section, this effect should not be denied on the ground, simply, that the clause was added in the course of the revision; on the contrary, the new section should receive the construction required by the natural import of the language it contains.—COLLINS v. MILLEN, Ohio, 48 N. E. Rep. 1097.

109. TAXATION—Railroad's Machine Shop.—A machine shop belonging to a railroad company, and used exclusively for repairs in its own business, is not subject to local taxation, such repairs being reasonably necessary to the successful prosecution of its business.—WESTERN NEW YORK, ETC. R. CO. v. VENANGO COUNTY, Penn., 38 Atl. Rep. 1088.

110. TAXATION—Recovery of Payments.—Recovery cannot be had against a county for that part of taxes wrongfully assessed which was for municipal and township purposes, they having been paid out of the county treasury before the filing of the claim.—CLEVELAND, C., C. & ST. L. RY. CO. v. BOARD OF COMRS. OF MARION COUNTY, Ind., 49 N. E. Rep. 51.

111. TOWNS—Illegal Contracts—Highways.—A contract for the construction of a highway was illegal where there was no money in the treasury to pay for such work, nor any tax levied, or intended to be levied, before such contract was let, or intended to be levied thereafter during the term of the officers letting such contract, and where it expressly provided that such work should be paid for out of a tax to be levied the next year, after the expiration of their term of office, when no such taxes were authorized by law, nor voted by the electors of the town.—BEYER v. TOWN OF CRANDON, Wis., 73 N. W. Rep. 771.

112. VENDOR AND PURCHASER—Contract—Proposal and Acceptance.—An offer to purchase lots at a certain value, subject to a certain incumbrance, which was accepted by the owner, who notified tenants to pay rent to the purchaser, and executed deeds therefor, subject, in terms, to the incumbrance mentioned, did not make a complete agreement for the purchase of the lots, where the incumbrance, which proved to have been greater than that mentioned in the deeds, had not been reduced, since the purchaser was not bound to accept the lot owner's covenant to reduce the incumbrance.—CONNOR v. BUHL, Mich., 73 N. W. Rep. 821.

113. VENDOR AND PURCHASER—Forfeiture.—A vendor who serves a notice of forfeiture on the purchaser because of a default, and afterwards sues to foreclose his vendor's lien, waives any meditated forfeiture.—OLD SECOND NAT. BANK OF BAY CITY v. ALPENA COUNTY SAV. BANK, Mich., 73 N. W. Rep. 809.

114. VENDOR AND PURCHASER—Rescission—Lien.—An absolute warranty deed, reciting a cash consideration, was made on the faith of and pursuant to an agreement by the grantee to convey to his grantor the west half of the land: Held, that the grantee took a full legal and equitable title to all the land, subject only to an equitable lien for any portion of the consideration left unpaid; and hence the grantor was not entitled to rescind on the grantee's failure to reconvey.—BEARROW v. WRIGHT, Tex., 43 S. W. Rep. 902.

115. VENDOR'S LIEN—Cross Bill.—In a suit to enforce a vendor's lien, and to recover a balance of the price, the action of the chancellor in refusing to allow a cross bill to be filed by the defendant, several years after he had answered in the case, setting up facts which defendant had known for 12 months, is discretionary, and will not be reviewed.—WILLIAMS v. SAX, Tenn., 43 S. W. Rep. 868.

116. WATERS—Navigable Waters—Riparian Rights.—Riparian owners on navigable waters hold their land subordinate to the public use of such waters, if such use is reasonably exercised, precisely as do the owners of land abutting on any other public highway.—DOUCETTE v. LITTLE FALLS IMP. & NAV. CO., Minn., 73 N. W. Rep. 847.

117. WILL—Construction.—No property not on the farm is included in the provision of a will: "After my said wife's decease, I give, devise and bequeath to my son F, my home farm, together with the appurtenances, fixtures, goods and chattels, etc., remaining upon said farm and belonging to my estate,"—testator having by preceding provisions made money bequests to his daughters, payable immediately on his death, and given to his wife for life "all the rest and residue of my estate, both real, personal and mixed, whereso-ever the same may be," and to his son C a money bequest, payable after decease of his wife.—IN RE SCHMIDT'S ESTATE, Penn., 38 Atl. Rep. 1086.

118. WILLS—Trusts—Termination.—Testator directed the income of certain property given in trust to be paid over to two of his children directly, and to a subtrustee for two others, "for and during the lives and the life of the survivor of them, and likewise during the life of the beneficiaries in the subtrust, and the survivor of them." He also directed that after the death of a certain one of the beneficiaries in the subtrust the income of that trust should be paid by the subtrustee "or his successor" in a certain manner, "until the death of the last of my four said children:" Held, that the subtrust would not come to an end until the death of the last of the four children.—SHATTUCK v. BALCOM, Mass., 49 N. E. Rep. 87.

119. WITNESSES—Credibility—Impeaching Evidence.—Evidence of the reputation of a witness for veracity in a place where he lived about a year before he testified is competent, in the absence of proof of a subsequent permanent residence at any particular place.—SCHOEP v. BANKERS' ALLIANCE INS. CO. OF CALIFORNIA, Iowa, 73 N. W. Rep. 825.